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No. _____

In The
Supreme Court of the United States
October Term, 1992

TV COMMUNICATIONS NETWORK, INC.,
Petitioner,

vs.

TURNER NETWORK TELEVISION, INC.,
a/k/a TNT, a Georgia Corporation,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI IN ORDER TO SUMMARILY REVERSE THE DECISION BELOW AND REMAND THIS CASE FOR RECONSIDERATION IN THE LIGHT OF ITS INTERVENING DECISION IN *EASTMAN KODAK CO. v. IMAGE TECHNICAL SERVICES, INC.*, ___ U.S. ___, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992)?

B. WHETHER THIS COURT SHOULD GRANT THE WRIT TO FIRMLY ESTABLISH THE PROPER STANDARD, IN ANTI-TRUST CASES, FOR THE APPLICATION OF RULES 12(b)(6), F. R. CIV. P., AND TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS ON THAT STANDARD?

C. WHETHER THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHERE THE ONLY ISSUE BEFORE THE COURT IS WHETHER THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED, WERE THE ALLEGATIONS OF THE COMPLAINT SUFFICIENT TO SHOW A RELEVANT PRODUCT MARKET; AND A GROUP BOYCOTT AGAINST TVCN AND A CONSPIRACY TO MONOPOLIZE CLAIM, BASED ON THE SAME ALLEGATIONS, IN BOTH OF WHICH TNT WAS A PARTICIPANT?

II.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as shown in the caption. Counsel for the respondent, TNT, is Miles C. Cortez, Jr., Esq., and Stephen J. Hensen, Esq. of Cortez & Friedman, P.C. of Denver, CO 80202 and John Dalton, Esq. and June Ann Kirkland, Esq. of Troutman, Sanders, Lockerman & Ashmore of Atlanta, GA 30303-1810.

Petitioner was represented before the United States Court of Appeals, respectively, by Irvin M. Kent, Esq. of Aurora, CO 80014 and Daniel F. Brotzman, Esq. of Englewood, CO 80110. Before the District Court, Petitioner was represented by Eric Ross of Denver, CO 80231.

The original defendants represented at the District Court and before the Court of Appeals were, respectively, ESPN and Cap Cities/ABC: Frederick J. Baumann, Esq. and Paul J. Zylstra of Rothgerber, Appel, Powers & Johnson of Denver, CO 80202 and Edwin Durso, Esq., General Counsel, ESPN, Inc. of New York, NY 10112; ATC and Mile Hi: William C. McClearn, Esq. and James E. Hartley, Esq. of Holland & Hart of Denver, CO 80201 and Robert D. Joffe, Esq. and Andrea Pollack, Esq. of Cravath, Swaine & Moore of New York, NY 10019; Scripps-Howard: James A. Clark, Esq. and Bruce D. Pringle, Esq. of Baker & Hostetler of Denver, CO 80203; TCI and United Artist Entertainment: Robert E. Youle, Esq. and Brian G. Eberle, Esq. of Sherman & Howard of Denver, CO 80202.

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IV.

DECISIONS BELOW

The decision below was announced by the United States Court of Appeals for the Tenth Circuit on May 19, 1992 and is reported at 964 F.2d 1022 (App. A).

That Court also issued an order denying the Petition of TVCN for a rehearing and a suggestion for rehearing en banc on July 2, 1992 (App. B).

V.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was announced on

(i) May 14, 1992.

(ii) The petition for rehearing was denied on July 2, 1992. No extension of time has been sought for the filing of this Petition.

(iii) This Court has jurisdiction pursuant to 28 U.S.C. 1254.

VI.

STATUTES INVOLVED HEREIN

The principal statutes involved in this Petition are 15 U.S.C. 1 and 15 U.S.C. 2. They are set forth verbatim in Appendix C.

VII.

STATEMENT OF THE RELEVANT FACTS

(All references to numbered paragraphs in this Brief are to paragraphs in the Amended Complaint. (The Complaint) Appendix D)

Petitioner, TVCN, is in the business of providing wireless cable TV services to subscribers for subscription television services in the Greater Metropolitan Denver geographical area. ¶ 2.

Respondent, Turner Network Television ("TNT") is in the business of manufacturing, producing and wholesale supplying of various types of video programming for subscription TV with a heavy emphasis on National Premium Sports Programming. The TNT programming is also referred to as the TNT Channel. ¶ 19. TNT is either wholly-owned or substantially owned and/or controlled by Turner Broadcasting Systems, Inc. ("TBS"). TBS is the alter ego of TNT in that (a) TBS and TNT have a common goal and a unity of interest, and (b) TBS has complete domination and control of the business affairs of TNT. TBS is largely owned by the owners and operators of the multiple cable television systems of original Defendants ATC, TCI, UAE, and Scripps. ¶ 8. (All of the original Defendants, other than TNT, entered into a settlement with TVCN prior to oral argument before the Court of Appeals and thus are no longer parties before this Court.) (App. A 964 F.2d 1023, n.l)

TNT is engaged in interstate commerce, both directly and indirectly, through either the sale of video programming, operation of cable TV systems, or the broadcasting of VHF television programs in Denver, Colorado. ¶ 12.

The TNT programming is transmitted to a certain satellite or satellites and retransmitted back to continental United States. The TNT Channel is encoded so that only authorized distributors or "affiliates" are allowed to receive it. With limited exceptions, the only affiliates that are authorized to receive the TNT Channel are cable TV operators. ¶ 16.

Cable TV operators can receive the TNT Channel, along with many other satellite channels, by means of satellite receiving equipment, and retransmit or distribute such channels locally on coaxial cables to viewers or "subscribers" who pay certain monthly fees for the right to receive the programming of said channels. The monthly fees are collected from subscribers by the cable TV operators. Portions of said fees are then passed on to TNT. ¶ 17.

An affiliate can be authorized or refused the authorization to receive the TNT Channel by means of a few pushbuttons into computers which are under the control of ESPN and TNT, respectively. ¶ 18. Coaxial cable is the means used by the cable companies for distributing the ESPN Channel, TNT Channel, and other cable networks or channels to viewers or subscribers. ¶ 34. The Federal Communications Commission ("FCC") recently authorized commercial use of microwave frequencies as an alternative to conventional or coaxial cable TV. A wireless cable TV station is one that employs microwave frequencies from the ITFS band, MMDS and/or other bands of frequencies. A wireless cable TV station usually carries more than one FCC license. ¶ 35.

Petitioner, TVCN, is a wireless cable TV operator and pursuant to FCC licenses has constructed a microwave TV station at Eldorado Mountain that broadcasts multiple TV channels on microwave frequencies over-the-air waves offering cable TV programming to all of Metro Denver ¶ 36, 38, at a lower price for viewers ¶ 39.

According to the Arbitron, the Area of Dominant Influence in Metro Denver has approximately 1,037,000 homes of which about 850,000 homes have been passed by coaxial cables. Conventional cable TV services are not currently available to the remaining 187,000 homes in Metro Denver. Conventional cable TV services may never become available for these uncabled homes because the population pattern of such uncabled areas may make it economically infeasible for the introduction of coaxial cable. ¶ 37. Since the TVCN signal is broadcast over the air without the need for underground or overhead cables, most people in Metro Denver will be able to receive this new service, including homes in the uncabled areas. ¶ 38.

A. Facts as to the claims for monopolization and attempted monopolization under Section 2.

The relevant geographical market is the Denver Metropolitan Area ("Metro Denver"). ¶ 26. Subscription television or cable TV subscription service in Metro Denver is the relevant product market. TVCN alleged the relevant product market as:

> ¶ 1 (a) " . . . so as to foreclose TVCN from entry into the relevant market for the purpose of allowing Defendants to restrain trade and commerce in *the market for Subscription Television*

> which includes the ESPN Channel and the TNT Channel in the Denver Metropolitan Area . . . " (Emphasis added)
>
> ¶ 1 (b): "monopolized, conspired to monopolize, and attempted to monopolize *the market for Subscription Television,* which includes the ESPN Channel and TNT Channel, in the Metro Denver geographic market . . . " (Emphasis added)
>
> ¶ 1 (c): "monopolized and abused their monopoly power *in the relevant market for Subscription Television,* which included the ESPN Channel the TNT Channel, in the Metro Denver geographic market, . . . " (Emphasis added)
>
> ¶ 1 (d): "monopolized and abused their monopoly power in the *relevant market for Subscription Television* and to gain an anticompetitive advantage for Defendants themselves, their parent or subsidiary companies in *the market for Subscription Television,* which includes the ESPN Channel and the TNT Channel, in the Metro Denver geographic market . . . " (Emphasis added)

¶¶ 27, 81, 130, 132, 134, 135 and 148 also allege this relevant product market.

The original defendant cable companies, UAE, Mile Hi, ATC, TCI and Scripps are cable TV operators operating, on an exclusive basis, cable TV systems in various cities in Metro Denver. Each cable company is a cable monopolist in each of their respective cities with a market share of subscription television approaching 100%. ¶¶ 21, 22, 23, 24, 25.

The purpose of the conspiracy was to allow the cable operators, who are also major owners of the stock of TNT's parent, TBS, "to entrench their monopoly powers

in Metro Denver." (¶¶ 77, 120, 121, 126, 134, and 136). The only reasonable inference from the acts of the defendants is that they had the specific intent to enhance and maintain the monopoly power in the subscription TV market of the cable TV operators in Metro Denver. The motives of the local cable operators were to protect themselves from competition by TVCN in Metro Denver and also to share in any increased profits and/or increase in the value of their stock holdings in TBS. (See ¶¶ 7 and 8).

B. As to the claims for conspiracy to monopolize under Section 2 and contracts, combination or conspiracy under Section 1

It is helpful to approach the conspiracy from the level of the cable TV operators. The cable operators directly compete with TVCN in Metro Denver to provide service to the subscribers. (¶¶ 96, 123.) The cable operators sell their service. The service they sell allows the subscribers to watch and listen to the programs. Since the cable TV industry was deregulated in 1984 their prices have increased 63-84%. Without competition, their prices will continue to increase. The only viable competitor is TVCN, a microwave TV operator.

TNT has exclusive agreements to cablecast many sports events. TNT has the exclusive right to carry many of the National Basketball Association ("NBA") games, the exclusive rights to carry the 1991 Pan Am games, the exclusive rights to carry the 1992 and the 1994 Winter Olympics and the exclusive rights to carry the 1990 World Cup Soccer. TBS has recently announced that the TNT Channel will carry 47 NFL games between 1990 and 1993

(three pre-season games and half the regular season games for each of the four years). ¶ 32.

The TNT Channel is a unique cable network. Many subscribers will not subscribe to subscription television if the TNT Channel is not available. When the ESPN Channel and the TNT Channel were included in the "basic-services" package, 100% of cable TV subscribers received both channels. When some cable TV operators took both Channels out of the basic-services package, and offered them as part of another package for extra or additional monthly subscription fees, almost 100% of basic subscribers elected to take both the ESPN Channel and the TNT Channel for the additional fees. Any competitor to a cable TV operator must carry the TNT Channel, and must be authorized to distribute the TNT Channel to subscribers, otherwise such competitor will be severely disadvantaged. ¶ 31. The national premium sports programming of TNT is carried by every cable TV operator in Metro Denver. ¶ 29.

In order to compete against cable TV operators in Metro Denver, a competitor must be able to offer potential subscription television subscribers in Metro Denver an array of programming channels that must be comparable to those channels that are offered by cable TV operators. No competitor can ever compete against cable TV operators in Metro Denver unless the competitor is authorized to receive the TNT Channel and include this channel in its subscription television services. ¶¶ 89, 90.

Original defendants TCI, ATC, UAE, Mile Hi and Scripps are direct horizontal competitors of TVCN and four of the five major cable MSO's that own and control

more than 50% of TBS, the parent company of TNT. ¶¶ 57, 58, 77, 96, 98, 99.

On August 3, 1990, TNT admitted to TVCN that TNT had entered into agreements with the cable TV operators to exclude wireless cable TV operators from receiving the TNT channel unless all the cable TV operators in Metro Denver agreed (¶ 55.) TVCN requested each of the cable operators for such permission but was denied. (¶ 56) The cable operators have agreed not to authorize TVCN to receive and transmit the TNT channel, thus depriving TVCN of an essential facility for it to be able to compete. (¶¶ 62, 63, 101).

Prior to the Cable Act of 1984 (47 U.S.C. 521 *et seq.*) going into effect, fees of cable TV programming and cable TV services were reasonable because they were regulated. After such deregulation went into effect in 1986, the fees of cable TV programming and cable TV services escalated 63% to 84%. ¶¶ 65, 66, 67, 68.

TVCN surveyed some 26,000 people in Metro Denver, of which approximately 79% expressed varying degrees of interest to switch from conventional cable TV to the new wireless cable TV of TVCN, provided that the new services are comparable with the conventional cable TV services. The new services will not be comparable unless the ESPN Channel and TNT Channel become available to TVCN. ¶ 69.

When potential subscribers discovered that TVCN's package of cable TV channels did not include the ESPN Channel and the TNT Channel, many of the would-have-been subscribers elected not to subscribe until such time

as the ESPN Channel and the TNT Channel are offered. ¶ 70.

There exist exclusive agreements between the original Defendants that limit the accessibility to the TNT Channel with some very limited exceptions of certain hotels and apartment complexes, which pose no real competitive threat to any of the Defendants. These illegal agreements are territorial allocation schemes aimed at preventing competition and are in violation of Section 1 of the Sherman Act. ¶ 110.

The conduct and acts by ESPN and TNT are unreasonable, against their own individual interest, and cannot be pro-competitive at either the intraband or interband level. ¶ 122.

As to interband competition, there are many cable TV channels (networks) that are currently offered to subscribers, however, there are only two that carry national premium sports programming, namely, the ESPN Channel and the TNT Channel. Because of their *exclusive* arrangements for football, basketball, baseball, championship games and other sports events, and the *uniqueness* of these sports events are considered by subscribers as essential. The refusal to deal with TVCN cannot have a pro-competitive effect upon interband competition. Starting another national premium sports programming channel requires hundreds of millions of dollars and tens of millions of subscribers just to acquire the right to cover certain sports events such as the NFL games. Further, since cable TV operators currently control the "bottleneck" for subscription television, their approval is critical to the success of such a hypothetical third national

premium sports programming Channel. Even if one is to believe that refusing to sell ESPN and TNT to wireless cable companies would somehow encourage others to create another national premium sports programming Channel, such a channel would in all likelihood be as unique and distinct as the ESPN Channel and the TNT Channel, hence would not be competitive, and would have no impact on price and output. Therefore, the refusal to deal with TVCN is anticompetitive, the aim of which is to eliminate competition against the Defendant cable operators and to entrench their monopoly power, all of which is detrimental to competition and consumers. ¶ 126.

The Defendants are aware of the subscribers' demand for the ESPN Channel and the TNT Channel, and their essential inclusion in any successful package of cable TV programming for subscription television. The ESPN Channel and TNT Channel are the only two cable TV channels that offer national premium sports programming for cable subscription. Without having access to these two national premium sports programming Channels, TVCN will not be able to compete against any of the original cable operator Defendants. ¶ 60.

The National Football League ("NFL") required TNT to have a minimum of 30 million subscribers before signing an exclusive agreement with TNT to cablecast some of the NFL games. Hundreds of millions of dollars are spent by TNT and ESPN to acquire exclusive arrangements to cablecast many of the sports events. It is impossible for TVCN to duplicate the ESPN Channel and the TNT Channel. Because of the entry barriers, and high capital costs, there is no reasonable replacement for the ESPN Channel

and TNT Channel. ¶ 107. The ESPN Channel and TNT Channel are each distinct "Essential Facilities".

The competitive process includes giving consumers competitive choices, the benefits of lower prices, better or different choices of products, and more efficient methods of production or delivery of services. ¶ 147. Subscription television is unique in that if a resident does not like the price, quality of reception or service provided by the monopolist, (a) the resident cannot find a reasonable substitute or interchangeable product for the ESPN Channel and TNT Channel, (b) the resident cannot simply go to an adjacent area and bring home the same or similar product, and, therefore, the resident will not have a competitive choice if TVCN is not allowed access to the ESPN Channel and TNT Channel ("essential facilities"). ¶ 145.

The conduct and acts of Defendants constitute an attempt to monopolize the market for subscription television, including the ESPN Channel submarket and the TNT Channel submarket. With the specific intent to monopolize, and with the implementation of a design and strategy in furtherance of such an attempt, Defendants have engaged in such acts as, *inter alia*, a group boycott, price-fixing, territorial allocations, refusal of access to essential facilities, exclusionary measures and unfair practices, and have thereby achieved a dangerous probability of success that they will obtain a monopoly in the market for subscription television in Metro Denver, including the ESPN Channel submarket and the TNT Channel submarket, if they have not already done so. ¶¶ 121, 135. (Similar paragraphs alleging a group boycott against TVCN (¶¶ 62 and 63) alleging monopolization (¶¶ 152, 153, 156, 157, 160, 161), alleging conspiracy to

monopolize (¶¶ 164, 165, 168, 169, 172, 173), and alleging attempt to monopolize (¶¶ 176, 177, 180 and 184)).

VIII.

REASONS FOR GRANTING A WRIT OF CERTIORARI

A. THE WRIT SHOULD BE GRANTED AND THE DECISION BELOW SHOULD BE SUMMARILY REVERSED FOR RECONSIDERATION IN LIGHT OF THE INTERVENING DECISION OF THIS COURT IN *EASTMAN KODAK CO. V. IMAGE TECHNICAL SERVICES, INC.*, ___ U.S. ___, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992)

It must be noted that the United States Court of Appeals for the Tenth Circuit (10th Cir.) did not have the benefit, when it announced its decision on May 19, 1992, of this Court's decision in *Eastman Kodak, supra*, which was announced on June 8, 1992. Indeed, the latter decision was not easily available when the 10th Circuit denied the petition for rehearing and suggestion for rehearing en banc.

1. With regard to the decision below as to the charges of monopolization and attempted monopolization under 15 U.S.C. 2, the 10th Circuit upheld their dismissal under Rule 12(b)(6) F. R. Civ. P. on the ground TVCN had failed to allege a relevant market which TNT was capable of monopolizing. It further held that TVCN had alleged the TNT Channel as the relevant market, and went on to say that "a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product." (at 964 F.2d 1025) (App. A-7).

However, this Court held in *Eastman Kodak* that a single product can constitute a relevant market under the Sherman Act. Further that the "proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." (at 112 S. Ct. 2090).

There was obviously no such factual inquiry performed when the motion to dismiss for failure to state a claim was granted.

This Court also stated that while, as a general rule, a firm can refuse to deal with its competitors, such a right is not absolute; "it exists only if there are legitimate competitive reasons for the refusal." (at 112 S. Ct. 2091, n. 32).

No such legitimate reasons were articulated by TNT which has yet to file a responsive pleading.

Thus even if TVCN had alleged the TNT Channel as the relevant market, it was premature to dismiss it's claim at this stage of the proceedings. However, this case presents another reason for summary reversal, i.e. the 10th Circuit has seriously mischaracterized the definition of the relevant market stated in the Complaint.

The pertinent factual allegations in the Complaint were set forth in ¶¶ 1-150, which were incorporated by reference into each of the substantive claims for relief. Despite these allegations, the 10th Circuit granted the dismissal on the basis of the TNT channel being the relevant market, and dismissed the arguments made in briefs and oral argument with the statement that "The Amended Complaint must stand or fall on its own." (at

964 F.2d 1025) (App. A-8). As noted in the Statement of Facts above, "subscription television" was described as the *relevant market* in the Complaint starting with ¶ 1. TVCN in its complaint treated the TNT channel as a *relevant submarket*. Mischaracterization of the allegations of a complaint is an impermissible basis for a dismissal under Rule 12(b)(6).

2. With regard to the charge of conspiracy to monopolize under Sherman 2 and contract, combination or conspiracy under Section 1, the decision should also be summarily reversed under the letter and spirit of *Eastman Kodak*.

These two counts of the complaint will be discussed together, since the same conspiratorial conduct may be used to support a claim of conspiracy under either Sherman 1 or 2 (*Moore v. Jas. Matthews & Co.*, 473 F.2d 328 (9th Cir. 1973)). Counsel has been unable to find any decision of this Court to the contrary.

Serious mischaracterizations of the Complaint contained in the decision of the 10th Circuit are also to be found in its decision as to these two claims for relief, i.e.

(1) The 10th Circuit stated that TVCN provided no facts to its claim that TNT conspired with the cable operators to further their monopoly power. (at 964 F.2d 1026) (App. A-10).
The complaint alleged, *inter alia*, that TNT and the cable operators, who were major shareholders of TNT's parent company, entered into an agreement which would

deny TNT programming to wireless competitors such as TVCN. (¶¶ 7, 8, 29, 16, 36, 38, 55, 56, 62, 63, 96, 101, 110, 123.)

(2) The decision below also found, apparently as a matter of fact, in this 12(b)(6) ruling, that the cable operators would have no incentive to allow TNT to be able to charge supercompetitive prices. (Last ¶ on 964 F.2d 1026) (App. A-11).

However, the complaint alleges that these same cable operators are also major shareholders of TBS, the parent company of TNT. Thus, they would gain from its profitability and/or increase in the value of the shares they held in TBS, and each have an interest in keeping TVCN out of competition by denying it the essential facility of the TNT Channel (see ¶¶ 57, 58, 77, 96, 98, and 99). As this Court pointed out in *Eastman Kodak*, even at the summary judgment stage the requirement is only that the "non-moving parties inferences be reasonable in order to reach the jury, . . . " (at 112 S. Ct. 2083). This must also be true, a *fortiori*, at this stage of the proceedings. The 10th Circuit paid lip service to this principle in the first sentence of its decision (at 964 F.2d 1023) (App. A-3) and then proceeded to ignore the same.

(3) Further the 10th Circuit held that since this was a vertical restraint, this was not subject to a *per se* rule unless there was some agreement to fix prices (at 964 F.2d 1027) (App. A-13).

As the complaint makes clear, assuming that this was a vertical restraint, it had

horizontal effects to keep TVCN from competing and thus allowed the cable operators to raise prices without fear of competition. This not only ignores the facts alleged in the complaint but also lacks any of the rigorous analysis of the effect on the market which this Court applied in *Eastman Kodak* (see particularly 112 S. Ct. 2083-2089).

(4) In the very next paragraph at 964 F.2d 1027 (App. A-13), the Tenth Circuit acknowledges that a group boycott is a *per se* violation of Sherman 1 and then dismissed the group boycott allegations because:

> "TNT is a programmer and thus competes at a different market level than the cable operators. TVCN has alleged that none of the cable operators at the same market level compete with each other. Consequently, no cause of action for group boycott exists based upon TVCN's amended complaint."

(5) This conclusion ignores the allegation that TVCN does compete with each of the cable operators in the Metro Denver market, and it was to protect their interests that TNT joined the group boycott. Again, what is missing here is the kind of analysis that this Court made in *Eastman Kodak* on the tying claim (at 112 S. Ct. 2079-2081).

(6) The same analysis is applicable to the holding that TNT's refusal to deal with TVCN is legal because TNT does not have a share of the subscription television market while the cable operators have nearly 100% of that market (at 964 F.2d 1027-1028) (App.

> A-14). Again, the ownership holdings in TNT's parent companies by the cable operators is ignored.

This decision fully deserves summary reversal.

Even, if for any reason, this Court should decide to not grant summary disposition of this case, in the light of its intervening decision in *Eastman Kodak*, there are other specific issues, procedural and substantive, which would justify a grant of the writ herein. These will be dealt with in the following two sections of this petition.

B. THE WRIT SHOULD BE GRANTED TO FIRMLY ESTABLISH THE PROPER STANDARD, IN ANTI-TRUST CASES, FOR THE APPLICATION OF RULE 12(b)(6) F. R. CIV. P., AND TO RESOLVE THE DIFFERENCES BETWEEN THE TENTH AND OTHER CIRCUITS IN DETERMINATION OF THAT STANDARD

Actually this should not be necessary. This Court has restated in no uncertain terms, that:

> "only if it's clear that no relief could be granted under any set of facts that could be proved consistent with the allegations"

may a motion be granted under this rule (*Hishon v. King & Spaulding*, 467 U.S. 69 (1984). Also this court had held that an anti-trust complaint is to be treated no differently. "This rule applies with no less force to a Sherman Act Claim . . . " (*McClean v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980)).

When an anti-trust case, such as this one, comes to this Court on the basis of a motion to dismiss, this Court

will assume the facts alleged in the Complaint to be true (*Blue Shield of Virginia v. McCready*, 457 U.S. 465, 468, n. 2 (1982)).

Despite the seeming clarity of these pronouncements the Courts of Appeal of the various Circuits have not applied them with the desirable, indeed, necessary degree of uniformity. The Tenth Circuit in this case paid lip service to the Rule, at the outset of its decision here, but did not apply the appropriate standard.

The best recent analysis of the proper test for determining a Rule 12(b)(6) motion is that of the Court of Appeals in *Walker v. South Central Bell Telephone Co.*, 904 F.2d 274, (5th Cir. 1990), wherein it was held that a complaint need not outline all of the elements of a cause of action, but must at least provide an inference that they exist. Further, that if pleadings provide adequate notice then an inference can be drawn that those elements exist. The requirement that pleadings state the evidentiary facts constituting the cause of action, in addition to providing notice, has been dropped.

While *Walker* was not a Sherman Act case, if the rule announced by this Court in *McClean, supra*, is believed, there is no reason to distinguish that holding on such basis. Obviously, here, the 10th Circuit has not properly applied the requisite standard. Other Circuits have, e.g. *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 62 (2d Cir. 1986); and *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed* 490 U.S. 1087 (1989), citing with approval the test enunciated in *Newman v. Universal Pictures*, 813

F.2d 1519, 1522 (9th Cir. 1987) that in a Sherman Act claim:

> "the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws."

TVCN's complaint, here under review, certainly meets the appropriate standard. If, for no other reason, this Court should grant the writ, and clearly and firmly establish the standard which it sought to establish in *McClean*.

A Sherman Act plaintiff, and, more importantly, competition and consumers, should not be allowed to suffer because the anti-trust injury occurred in the 10th Circuit.

From the Complaint (App. D), this Court can discern an anti-trust injury to TVCN, to competition in the Denver Metro area, and to customers of subscription television therein. Nothing more should be required for a complaint to survive a motion to dismiss.

C. THE 10TH CIRCUIT IMPROPERLY DENIED A *PER SE* TEST TO THE GROUP BOYCOTT WHICH CUT OFF ACCESS TO AN ESSENTIAL FACILITY WHICH WAS NECESSARY FOR TVCN TO BE ABLE TO COMPETE, AND STRUCK DOWN THE CONSPIRACY TO MONOPOLIZE CLAIM

Assuming, *arguendo*, that it was necessary for the lower court to make a *per se* or a rule of reason approach decision at this stage of the proceedings (*see Gilder v. PGA Tour, Inc.*, 936 F.2d 424 (9th Cir. 1991)), the allegations of

the complaint were such as to entitle TVCN to the benefit of a *per se* ruling on its Sherman 1 cause of action.

1. Group Boycott

This Court has carefully analyzed its prior decisions and found that a *per se* standard is applicable at least to those group boycotts which cut off access to a supply or facility necessary to allow the boycotted firm to compete. This was held to be especially true where the boycotting firms possessed a dominant position in the relevant market (*Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294 (1985)).

Other circuits, particularly since the decision in *Northwest Wholesale*, have not hesitated to find a *per se* violation where even a non-price restraint of trade was involved but which induced suppliers to not provide the victim with services that the victim needs in order to compete (*Movie 1 & 2 v. United Artists Communications, Inc.*, 909 F.2d 1245 (9th Cir. 1990)) (in *Movie 1 & 2* the Court also held that the issue of whether this was the result of concerted action presented a jury question, id at 909 F.2d 1251-1252) (see also *McCabe's Furniture, Inc. v. La-z-Boy Chair Co.*, 798 F.2d 323 (8th Cir 1986)). Where an issue presents a jury question it cannot be decided on a Rule 12(b)(6) motion. In the determination of such a motion, dismissal of a complaint may not be made because the lower court does not believe the allegations therein (*Nietske v. Williams*, 490 U.S. 319, 327 (1989)).

Thus, even though the agreement between TNT and the cable operators may have been vertical, its effect on competition was horizontal and thus runs afoul of the

Sherman Act (*Jayco Systems, Inc. v. Savin Business Machines Corp.*, 777 F.2d 306, 316-319 (5th Cir. 1985)) *Com-Tel, Inc. v. Du Kane Corporation*, 669 F.2d 404 (6th Cir. 1982)).

The 10th Circuit in ruling on the group boycott issue (at 964 F.2d 1027) (App. A-13) also ignored the holding of this Court in *Blue Shield of Virginia v. McCready, supra*, that one who has suffered anti-trust injury as a result of a group boycott may bring an action under the anti-trust laws (at 457 U.S. 472-473). TVCN has alleged that it suffered and continues to suffer from the group boycott which required the participation of TNT to be successful. This factor alone would justify the grant of the writ.

IX.

CONCLUSION

This Court should grant the petition, issue the writ and summarily reverse the decision below and remand to the 10th Circuit for reconsideration in the light of its intervening decision in *Eastman Kodak, supra*. Alternatively, if this Court should determine, for any reason, that this case is inappropriate for summary disposition, this Court should grant the writ and order briefs and arguments on the merits, as to whether the allegations in the Complaint were (1) sufficient to withstand a motion for dismissal under Rule 12(b)(6), (2) whether the allegations in the Complaint were sufficient to allege a relevant product market to support claims for monopolization and attempted monopolization, and (3) whether the allegations of the Complaint were sufficient to support a claim

against TNT for participation in a group boycott aimed at excluding TVCN from competition, and a conspiracy to monopolize claim based upon the same allegations.

Respectfully submitted,

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APPENDICES

APPENDIX A
PUBLISH

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

TV COMMUNICATIONS NETWORK, INC.,	No. 91-1176
Plaintiff-Appellant,	
v.	
TURNER NETWORK TELEVISION, INC., a/k/a TNT, a Georgia corporation,	
Defendant-Appellee,	
ENTERTAINMENT AND SPORTS PROGRAMMING NETWORK, INC., a/k/a ESPN, Inc., a/k/a Entertainment Acquisition Ltd., a Delaware corporation; CAPITAL CITIES/ABC, INC., d/b/a ABC Television Network, a/k/a ABC, a New York corporation; TELE-COMMUNICATIONS, INC., a/k/a TCI, a Delaware corporation; UNITED ARTISTS ENTERTAINMENT COMPANY, a/k/a UAE, a Delaware corporation; AMERICAN TELEVISION AND COMMUNICATIONS CORP., a/k/a ATC, a Delaware corporation; SCRIPPS HOWARD CABLE COMPANY, and SCRIPPS HOWARD COMMUNICATIONS ("SCRIPPS"), an Ohio corporation; MILE HI CABLE COMPANY, d/b/a a Mile Hi Cablevision, a/k/a Mile Hi, a Colorado corporation,	
Defendants.	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. NO. 90-F-864)
(Filed May 19 1992)

Irvin M. Kent (Daniel L. Brotzman, Englewood, Colorado, with him on the brief), Aurora, Colorado, for Plaintiff-Appellant.

Alan P. Shor (John J. Dalton, P.C. and June Ann Sanders of Troutman, Sanders, Lockerman & Ashmore, Atlanta, Georgia; Miles C. Cortez, Jr., and Stephen J. Hensen of Cortez Friedman & Coombe, Denver, Colorado, with him on the brief) of Troutman, Sanders, Lockerman & Ashmore, Atlanta, Georgia, for Defendant-Appellee.

Before **MOORE** and **BRORBY**, Circuit Judges, and **HUNTER**,* Senior District Judge.

BRORBY, Circuit Judge.

TV Communications Network, Inc. (TVCN) appeals the district court's dismissal of its antitrust complaint for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). TVCN further alleges the

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* The Honorable Elmo B. Hunter, Senior United States District Judge for the Western District of Missouri, sitting by designation.

district court abused its discretion by denying TVCN leave to file a second amended complaint. We affirm.

1. BACKGROUND

TVCN's amended complaint alleges the following facts which we assume are true for the purposes of our review. TVCN is in the business of providing cable television for a fee to subscribers in Metropolitan Denver. While most subscription television operators distribute programming through coaxial cable, TVCN is a wireless cable operator which utilizes new microwave transmission technology.

Turner Network Television (TNT), the only remaining defendant,[1] is in the business of manufacturing, producing and supplying video programming, especially National Premium Sports Programming. Turner Broadcasting Systems, Inc. (TBS) is the alter ego of TNT and is owned largely by other cable operators such as American Television and Communications Corp., Tele-Communications, Inc., United Artists Entertainment Co. and Scripps Howard Cable Company (former defendants).

Three distinct links create the chain of distribution for subscription television programming: programmers,

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[1] The other original defendants ESPN, Capital Cities/ABC, Inc., Tele-Communications, Inc., United Artists Entertainment Co., American Television and Communications Corp., Scripps Howard Cable Company, Scripps Howard Communications, and Mile Hi Cable Co. settled out of court and are no longer parties to this appeal.

operators and subscribers. Programmers are the manufacturers and wholesale distributors of subscription programming who create their own shows or obtain rights to other events. Operators are the retailers at the local level who distribute shows from the programmers. Subscribers are the ultimate consumers who pay the operators a monthly fee to receive the programmers' events. TNT is a programmer, and TVCN is an operator.

Since 1988, TNT has refused to allow TVCN to receive its programming in order for TVCN to offer it to its subscribers. When surveying potential subscribers in Metropolitan Denver, TVCN discovered many would not subscribe until such a time that the TNT channel is available. Existing subscribers threatened to terminate their subscription if the TNT channel is not made available. Consequently, TVCN filed this lawsuit to force TNT to make its programming available to TVCN.

The district court dismissed TVCN's amended complaint for failure to state a claim upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6). The district court also denied TVCN's request for leave to file a second amended complaint finding "[a]ny further amendments would serve no useful purpose."

TVCN appeals and asserts the district court erred by dismissing its complaint for failure to state a claim where the amended complaint alleged sufficient facts to support an antitrust cause of action and provided adequate notice of those claims. TVCN also claims the district court abused its discretion by refusing leave to file a second amended complaint which would cure any alleged deficiencies in TVCN's first amended complaint.

II. FAILURE TO STATE A CLAIM

Upon review of a dismissal under Rule 12(b)(6), we must assume the facts which TVCN has alleged in its amended complaint are true. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 526 (1983); *Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n,* 891 F.2d 1473, 1476 (10th Cir. 1989), *cert. denied,* 495 U.S. 930 (1990). We review de novo the sufficiency of a complaint, and will dismiss only if it appears the plaintiff can prove no set of facts which entitle him to relief on his claim. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Cayman Exploration Corp. v. United Gas Pipe Line Co.,* 873 F.2d 1357, 1359 (10th Cir. 1989). "[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations' a claim must be dismissed." *Neitzke v. Williams,* 490 U.S. 319, 327 (1989) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)).

Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief. *See Mountain View Pharmacy v. Abbott Labs.,* 630 F.2d 1383, 1387 (10th Cir. 1980). A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. Conclusory allegations that the defendant violated those laws is insufficient. *Id.* (citing *Klebanow v. New York Produce Exch.,* 344 F.2d 294, 299 (2d Cir. 1965)).

Our review of TVCN's amended complaint reveals the allegations contained therein fail to state any claim for relief against TNT. Accordingly, we affirm the district

court's order dismissing the amended complaint against TNT.

A. Section 2 of the Sherman Act

Section 2 of the Sherman Act prohibits monopolies in interstate trade or commerce.[2] Conduct violates this section where an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389-90 (1956); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987).

1. Monopolization

The two elements required to maintain a section 2 monopoly claim are: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 562, 570-71 (1966); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 973

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[2] The relevant portion of section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . .

15 U.S.C. § 2 (1988).

(10th Cir.), *cert. denied,* 110 S. Ct. 3241 (1990). As discussed, TVCN must plead facts sufficient to support these elements to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6).

TVCN's amended complaint alleges TNT monopolized the market for the TNT channel in Metropolitan Denver. TVCN claims TNT has complete control of the TNT channel market with a 100% market share. Furthermore, TVCN alleges TNT has misused its monopoly power to gain competitive advantage and has restrained trade unreasonably. Finally, TVCN charges TNT has engaged in illegal territorial allocations, refusing access to essential facilities, and in anticompetitive, exclusionary, boycott, price-fixing and unfair acts. TVCN concludes TNT's actions are unreasonable and against their own individual interest.

TVCN fails to allege a relevant market which it is capable of monopolizing. TVCN's amended complaint specifically names the TNT channel as the relevant product market monopolized by TNT. However, a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product. *See E. I. du Pont de Nemours,* 351 U.S. at 393; *Key Fin. Planning Corp. v. ITT Life Ins. Corp.,* 828 F.2d 635, 643 (10th Cir. 1987). Consequently, TVCN has not alleged a relevant market which TNT is capable of monopolizing in violation of the antitrust laws.

Contrary to the allegations in its amended complaint, TVCN asserts on appeal that the market for the TNT channel is not the relevant market to consider. TVCN now alleges the relevant product market is subscription

television programming or sports programming. This new definition of the relevant market is futile as it mischaracterizes the allegations in the amended complaint. The amended complaint must stand or fall on its own. We hold the relevant market as defined in the amended complaint is defective as a matter of law. Because we conclude TVCN failed to allege the first monopolization element -- monopoly power in the relevant market, we need not consider the second element -- acquisition or maintenance of monopoly power. We conclude TVCN has failed to state a monopolization claim against TNT. We therefore affirm the district court's dismissal of TVCN's monopolization claim against TNT pursuant to Fed. R. Civ. P. 12(b)(6).

2. Attempt to Monopolize

The four elements necessary to establish an attempt to monopolize claim are: "(1) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt." *Colorado Interstate Gas Co. v. Natural Gas Pipeline*, 885 F.2d 683, 693 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 441 (1990). The key inquiry involves the power of the defendant in the market in which it competes. *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1376 (10th Cir. 1979). Initially, therefore, the plaintiff must plead facts sufficient to establish the existence of a relevant market and the defendant's power in that market. *Id.*

TVCN alleges TNT attempted to monopolize the market for the TNT channel. TVCN asserts TNT evidenced a

"specific intent to control prices and destroy competition in the relevant market through predatory and anticompetitive conduct." The specific conduct alleged includes a "group boycott, price fixing, territorial allocations, access refusal to essential facilities, exclusionary measures and unfair practices" which have assured TNT a dangerous probability of success in obtaining a monopoly in the market for the TNT channel in Metropolitan Denver.

TVCN again defines the TNT channel in Metropolitan Denver as the relevant product market. However, as we discussed previously a claim cannot lie against TNT for the monopolization of its own product. *See Key*, 828 F.2d at 643. We conclude the relevant market as defined in TVCN's amended complaint is insufficient as a matter of law. Thus, TVCN can prove no set of facts which show TNT has a dangerous probability of success in monopolizing the defined relevant market. TNT cannot violate the Sherman Act by attempting to monopolize a market which it is incapable of monopolizing. We therefore affirm the district court's dismissal of TVCN's attempt to monopolize claim against TNT pursuant to Rule 12(b)(6).

3. Conspiracy to Monopolize

To establish a claim for conspiracy to monopolize in violation of section 2, a plaintiff must plead facts sufficient to support four elements: (1) "the existence of a combination or conspiracy to monopolize"; (2) "overt acts done in furtherance of the combination or conspiracy"; (3) "an effect upon on appreciable amount of interstate commerce"; and (4) "a specific intent to monopolize."

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432, 438 (10th Cir.), *cert. denied*, 464 U.S. 866 (1983).

In its amended complaint, TVCN alleges TNT has combined or conspired with other defendants to monopolize the market for the TNT channel. TVCN asserts the overt acts and specific intent to monopolize are evidenced by access refusal to essential facilities for the relevant TNT channel market in Metropolitan Denver, fixing prices, a group boycott, unreasonable territorial allocations and exclusionary measures.

Additionally, TVCN alleges TNT admitted entering into exclusive agreements with cable operators to exclude TVCN from receiving the TNT channel until all the Metropolitan Denver operators agree to allow TVCN to receive the TNT channel. Thus, TVCN claims the cable operator owners of TBS and TNT have conspired to boycott TVCN to further the monopoly power of the cable operators.

"[A] bare bones [accusation] of conspiracy . . . without any supporting facts" is insufficient to state an antitrust claim. *Mountain View Pharmacy*, 630 F.2d at 1388. In its amended complaint, TVCN alleges only that TNT conspired with other defendants. TVCN provides no facts in support of its claim that TNT conspired with the cable operators to further their monopoly power. While TVCN uses antitrust language in its complaint, such as price fixing, group boycott and exclusionary measures, it fails to elaborate on these allegations. The use of antitrust "buzz words" does not supply the factual circumstances necessary to support TVCN's conclusory allegations.

Although it is reasonable to infer that an entity would act to further its own monopoly power, it is implausible that the cable operator defendants would conspire with TNT to aid TNT in its efforts to acquire or to maintain a monopoly in the market for the TNT Channel. If, as TVCN alleges, the TNT Channel is "essential" to the cable operators, then achievement of the goal of the conspiracy would actually be contrary to the interests of the cable operators. In such a monopolistic environment, TNT would have the power and the incentive to charge the cable operators supracompetitive prices for the TNT service. Because the cable operators would have no rational motive to create such an environment, TVCN's allegations do not provide an inference of specific intent to conspire to achieve the stated goal of the conspiracy. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986).

A complaint is subject to dismissal where it does "little more than recite the relevant anti-trust laws." *Mountain View Pharmacy*, 630 F.2d at 1387. We hold TVCN has failed to state a claim against TNT for conspiracy to monopolize. We therefore affirm the district court's dismissal of TVCN's conspiracy to monopolize claim against TNT for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

B. Section 1 of the Sherman Act

Section 1 of the Sherman Act forbids contracts, combinations or conspiracies in restraint of trade.[3] To state a claim for a violation of section one the plaintiff must allege facts which show: the defendant entered a contract, combination or conspiracy that unreasonably restrains trade in the relevant market. *See Reazin*, 899 F.2d at 959. Under section one we determine the illegality of a contract, combination or conspiracy by examining whether: (1) it "constitute[s] a per se violation of the statute"; or (2) its "purpose or effect is to create an *unreasonably* restraint of trade." *Cayman*, 873 F.2d at 1359-60.

TVCN alleges TNT's conduct results in an unreasonable restraint of trade and unfair competition. In support of these allegations TVCN states TNT has engaged in group boycott, access refusals to essential facilities, exclusionary measures, territorial allocations and price discrimination.

The alleged conspiracy is between TNT and the cable operators. Because this agreement is between entities at different market levels the alleged restraint is a vertical restraint.[4] *See United States v. Topco Assocs., Inc.*, 405 U.S.

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[3] The relevant portion of section one provides:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

15 U.S.C. § 1 (1988).

[4] TVCN attempts to establish horizontal competition between itself and TNT based on the fact four cable operators in Metropolitan Denver allegedly own more than 50% of TBS, the parent company of TNT. TVCN has not specified in which mar-

596, 608 (1972). Vertical restraints are not illegal per se unless they include some agreement as to pricing levels. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735-36 (1988). Although TVCN alleges TNT engaged in price fixing, it alleges no facts to support this conclusory assertion. TVCN's complaint does not disclose the existence of a pricing agreement. Accordingly, we conclude TVCN cannot establish a section one claim against TNT based on price fixing.

A group boycott is another per se violation of section one. *Key*, 828 F.2d at 640. However, a group boycott can only exist between conspirators who compete at the same market level. *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1224 n.1 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988). TNT is a programmer and thus competes at a different market level than the cable operators. TVCN has alleged that none of the cable operators at the same market level compete with each other. Consequently, no cause of action for group boycott exists based upon TVCN's amended complaint.

Next, we consider the factual circumstances alleged by TVCN to ascertain whether the agreement between the cable operators and TNT to refuse to deal with TVCN has

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ket this horizontal competition exists. Nor has TVCN provided any facts to support the existence of this alleged competition. We hold that TVCN's bare bones conclusion that horizontal competition exists between itself and TNT is insufficient as a matter of law.

the effect of suppressing competition in the subscription television market.[5] *See Reazin*, 899 F.2d 9.

Section one only prohibits refusals to deal where a manufacturer has monopoly power in the market. *See Westman*, 796 F.2d at 1229. In this case, TNT is the "manufacturer" of the TNT channel. However, TNT does not have any market share of the subscription television market. In fact, TVCN's amended complaint shows that the cable operators have nearly 100% share of this market. Consequently, TNT's refusal to deal is not violative of the antitrust laws. Accordingly, we hold TVCN has failed to state a claim against TNT for a violation of section one of the Sherman Act. We affirm the district court's dismissal of TVCN's section one claim pursuant to Rule 12(b)(6).

C. State Law Claims

TVCN asserts claims based upon allegations of various state law violations. The district court exercised pendent jurisdiction is extended at the discretion of the court and is not a plaintiff's right. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial . . . the

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[5] As we have concluded in Part A. *supra*, no competition exists in the market for the TNT channel, therefore any agreement by TNT could have no negative or positive effect on competition in that market.

state claims should be dismissed as well." *Id.* (footnote omitted).

As federal claims have all been dismissed no independent jurisdiction exists for the state law claims. We therefore affirm the trial court's dismissal of TVCN's state law claims without prejudice.

III. SECOND AMENDED COMPLAINT

TVCN requested leave to file a second amended complaint. The district court denied TVCN's motion finding that any further amendments would be futile. Although Fed. R. Civ. P. 15(a) requires leave to amend be given freely, that requirement does not apply where an amendment obviously would be futile. *Foman v. Davis,* 371 U.S. 178, 182 (1962); *Mountain View Pharmacy,* 630 F.2d at 1389.

The district court has discretion when considering whether to allow a plaintiff to amend its complaint. *First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.,* 820 F.2d 1127, 1132 (10th Cir. 1987). We will not overturn that decision absent an abuse of discretion. *Id.* A court abuses its discretion if it refuses leave without expressing any justification, however, if the denial rests on articulated reasons such as failure to cure deficiencies by previous amendments or futility of amendment the district court's decision shall stand. *See Id.* " 'Where a complaint, as amended, would be subject to dismissal, leave to amend need not be granted.' " *Mountain View Pharmacy,* 630 F.2d at 1389 (quoting *DeLoach v. Woodley,* 405 F.2d 496, 497 (5th Cir. 1968)).

The district court already granted TVCN one opportunity to amend its complaint. When the district court denied TVCN's second motion to amend it found any further amendments would be futile. After dismissing TVCN's amended complaint for failure to state a claim pursuant to Rule 12(b)(6), the district court properly gave reasons for its refusal to grant leave to amend. Upon review of TVCN's complaint, we also conclude TVCN would be unable to cure the deficiencies therein. Moreover, TVCN has made no showing how it could cure the defects present in its current complaint. We hold the district court did not abuse its discretion by denying TVCN leave to file a third complaint.

IV. CONCLUSION

We affirm the district court's dismissal of TVCN's complaint for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6). TVCN did not allege a relevant product market which TNT was capable of monopolizing, attempting to, or conspiring to monopolize in violation of section 2 of the Sherman Act. Furthermore, TVCN did not allege facts sufficient to support a violation of section one of the Sherman Act. As all TVCN's federal claims are dismissed, we also affirm the dismissal of TVCN's pendent state law claims. Finally, we affirm the district court's refusal to grant TVCN leave to again amend its complaint.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TV COMMUNICATIONS NETWORK, INC.,

Plaintiff - Appellant,

v.

ENTERTAINMENT AND SPORTS PROGRAMMING NETWORK, INC., also known as ESPN, Inc., also known as Entertainment Acquisition Ltd., a Delaware corporation; CAPITAL CITIES/ ABC, INC., doing business as ABC Television Network, also known as ABC, a New York corporation; TELE-COMMUNICATIONS, INC., also known as TCI, a Delaware corporation; UNITED ARTISTS ENTERTAINMENT COMPANY, also known as UAE, a Delaware corporation; AMERICAN TELEVISION AND COMMUNICATIONS CORP., also known as ATC, a Delaware corporation; SCRIPPS HOWARD CABLE COMPANY; SCRIPPS HOWARD COMMUNICATIONS ("SCRIPPS"), an Ohio corporation; MILE HI CABLE COMPANY, doing business as Mile Hi Cablevision, also known as Mile Hi, a Colorado corporation,

Defendants,

and

TURNER NETWORK TELEVISION, INC., also known as TNT, a Georgia corporation,

Defendant – Appellee.

No. 91-1176

ORDER
Entered July 2, 1992

Before McKAY, Chief Judge; LOGAN, SEYMOUR, MOORE, ANDERSON TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges, and HUNTER*, District

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This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

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*Honorable Elmo B. Hunter, Senior United States District Judge for the Western District of Missouri, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-F-864

TV COMMUNICATIONS NETWORK, INC. a/k/a TVCN
Plaintiff,

vs.

ESPN, INC. a Delaware Corporation;
CAPITAL CITIES/ABC, INC., doing business as ABC Television Network, a/k/a ABC, a New York Corporation;
TELE-COMMUNICATIONS, INC., a/k/a TCI a Delaware Corporation;
UNITED ARTISTS ENTERTAINMENT CO., a/k/a UAE, a Delaware Corporation;
AMERICAN TELEVISION AND COMMUNICATIONS CORP., a/k/a ATC, a Delaware Corporation;
SCRIPPS HOWARD CABLE COMPANY; and SCRIPPS HOWARD COMMUNICATIONS ("SCRIPPS"), an Ohio Corporation;
MILE HI CABLE COMPANY, d/b/a MILE HI CABLEVISION, a/k/a Mile Hi, a Colorado Corporation;
TURNER NETWORK TELEVISION, INC., a/k/a TNT, a Georgia Corporation;
Defendants.

AMENDED COMPLAINT

(Filed 90 AUG 17)

Plaintiff, for its Amended Complaint against Defendants, states and alleges upon information and beliefs as follows:

I. INTRODUCTION

1. This is an action to obtain injunctive relief and recover monetary damages arising out of the illegal, anti-competitive and monopolistic activities of Defendants ESPN, Inc. ("ESPN"), Capital Cities/ABC, Inc. ("ABC"), Tele-Communications, Inc. ("TCI"), United Artists Entertainment Co. ("UAE"), American Television and Communications Corp., ("ATC"), Scripps Howard Cable Company and Scripps Howard Communications ("Scripps"), Mile Hi Cable Company ("Mile Hi"), and Turner Network Television, Inc. ("TNT"). Defendants have violated and continue to violate the federal antitrust laws by engaging in an integrated series of predatory and exclusionary acts and strategies, designed to control the distribution of subscription television, to prevent access to essential facilities, to raise barriers to entry and expansion, increase prices while reducing output, and otherwise entrench themselves as monopolists by anticompetitive conduct, injuring the competitive process, competitors and ultimately consumers. In pursuit of their strategies, the Defendants have:

(a) entered into contracts, agreements, understandings, or a combination between themselves, or otherwise to boycott or conspire against TVCN so as to foreclose TVCN from entry into the relevant market for the purpose of allowing Defendants to restrain trade and commerce in the market for subscription television, which includes the ESPN Channel and TNT Channel in the Denver Metropolitan Area ("Metro Denver") in violation of Section 1 of the Sherman Act;

(b) monopolized, conspired to monopolize, and attempted to monopolize the market for Subscription Television, which includes the ESPN Channel and TNT Channel, in the Metro Denver geographic market in violation of Section 2 of the Sherman Act, 15, U.S.C., Section 2;

(c) monopolized and abused their monopoly power in the relevant market for Subscription Television, which included the ESPN Channel and TNT Channel, in the Metro Denver geographic market, in violation of Section 2 of the Sherman Act;

(d) monopolized and abused their monopoly power in the relevant market for Subscription Television and to gain an anticompetitive advantage for Defendants themselves, their parent or subsidiary companies in the market for Subscription Television, which includes the ESPN Channel and TNT Channel, in the Metro Denver geographic market in violation of Section 2 of the Sherman Act.

In addition, the Defendants have violated and continue to violate certain common law duties by:

(a) engaging in acts of unfair competition;

(b) intentionally interfering with the contractual relations between TVCN and Defendant ESPN;

(c) intentionally interfering with prospective business relations of TVCN; and

(d) intentionally making false representations regarding the ESPN Channel.

II. PARTIES

2. Plaintiff, TV Communications Network, Inc. ("TVCN") is a Colorado corporation with its principal executive offices in Denver, Colorado, and is in the business of providing wireless cable TV and Satellite Master Antenna TV services to subscribers for subscription television services in the Greater Metropolitan Denver geographical area, and intends to ultimately offer its services to potential subscribers nationwide.

3. Defendant ESPN, Inc., a/k/a ESPN, is a Delaware corporation with its principal executive offices in Bristol, Connecticut, and is in the business of manufacturing, producing and wholesale supplying of National Premium Sports Programming ("NPSP"). ESPN is 80% owned and controlled by Defendant Capital Cities/ABC, Inc. ("ABC"). ABC's principal line of business includes the manufacturing, production and broadcasting of information, news and entertainment. ABC is a New York corporation whose principal offices are in New York City, New York. ABC dominates, controls and substantially influences the management and business affairs of ESPN.

4. Defendant Tele-Communications, Inc. ("TCI") is the largest cable television operator in the United States. In addition to owning a large percentage of Mile Hi Cablevision and TBS, TCI also owns large percentages of United Cable and United Artists Communications. Both United Cable and United Artists Communications have recently merged under the name of United Artists Entertainment Co. ("UAE") giving TCI more than 50% control and/or ownership of UAE. UAE is the cable television operator that offers cable television services to cable TV

subscribers in Arvada, Aurora, Lakewood and other cities in the Denver Metropolitan Area. ("Metro Denver"). TCI and UAE have their principal offices in Denver, Colorado.

5. Through American Cablevision, Defendant American Television & Communications, Corp. ("ATC"), is the cable TV operator that offers cable television services to cable TV subscribers in Littleton, Thornton, Wheat Ridge and other cities in Metro Denver. American Cablevision is either wholly-owned or substantially owned and/or controlled by ATC. ATC is the second largest cable TV operator in the United States, owning or managing more than 100 cable TV systems under several hundred franchises in 32 states. ATC is an 82 percent owned subsidiary of Time-Warner, Inc. ("Time"). ATC has its principal executive offices in Stanford, Connecticut. Time is among the largest entertainment and publishing conglomerates in the world. Time's principal lines of business include the manufacturing, production and distribution of video programming, and the operation of cable television systems. Time also owns 100% of Home Box Office ("HBO") and Cinemax. Time, directly or through ATC, is one of the major owners of TBS, the parent company of Defendant TNT.

6. Defendant Scripps Howard Cable Company is the cable TV operator that offers cable television services to cable TV subscribers in Louisville in Metro Denver, and is either wholly-owned or substantially owned and/or controlled by the Defendant Scripps Howard Communications ("Scripps"), which is one of the MSO's that has a large ownership interest in TBS.

7. Defendant Mile Hi Cable Company ("Mile Hi") is the cable television operator in the City of Denver that provides cable television services to cable TV subscribers in the City of Denver. Mile Hi Cablevision is largely owned and/or controlled by Defendants TCI and ATC.

8. Defendant Turner Network Television ("TNT") is a Georgia corporation with its principal executive offices in Atlanta, Georgia, and is in the business of manufacturing, producing and the wholesale supplying of various types of video programming with a heavy emphasis on National Premium Sports Programming. TNT is either wholly-owned or substantially owned and/or controlled by Turner Broadcasting Systems, Inc. ("TBS"). TBS is the alter ego of TNT in that (a) TBS and TNT have a common goal and a unity of interest, and (b) TBS has complete domination and control of the business affairs of TNT. TBS is largely owned by the owners and operators (known as MSO's) of multiple cable television systems such as Defendants ATC, TCI, UAE, and Scripps.

III. JURISDICTION AND VENUE

9. This complaint is filed and these proceedings are instituted under Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2, Sections 2(a) and 4 of the Clayton Act as amended, 15 U.S.C. Sections 13 and 15, 28 U.S.C. Sections 1331, 1337, 1391, Section 16 of the Clayton Act, 15 U.S.C. Sections 4, 22 and 26; and Colo. Rev. Stat. 6-2-111 and 6-4-104, and for injunctive relief against continuing violations by Defendant of the aforementioned statutes and Sections 1 and 2 of the Sherman Act and 15

U.S.C. Sections 1, 2, 13 and 15, and certain common law duties.

10. This Court has pendent jurisdiction over the claims arising out of violations of Colo. Rev. Stat. Annotated Sections 6-2-101 through 6-2-117 inclusively and 6-4-101 through 6-4-109 inclusively, commonly known as the Unfair Practices Act and Restraint of Trade and Commerce Article respectively.

11. All of Plaintiff's claims arise from a common nucleus of operative facts involving substantially identical issues of fact and law.

12. Venue as to the parties is laid in this Court in the District of Colorado pursuant to the provisions of Sections 2 and 4 of the Clayton Act, 15 U.S.C. Sections 15, 22, and 28 U.S.C. Section 1391(c). The Defendants transact business and are found within the District of Colorado, and are within the jurisdiction of this Court for the purpose of service of this Complaint. Defendants are engaged in interstate commerce, both indirectly and directly, through either the sale of video programming, operation of cable TV systems, or the broadcasting of VHF television programs in Denver, Colorado. The ESPN and TNT programming is a commodity within the meaning of Section 2(a) of the Clayton Act as amended, 15 U.S.C. Section 13(a). The program that can be copyrighted and condensed into a product is a product.

13. The interstate trade and commerce described herein is carried out within, into and from the District of Colorado. The acts complained of herein are within the flow of interstate trade and commerce and these acts have

a direct and substantial effect on that trade and commerce.

14. This is an action to obtain injunctive relief and recover monetary damages arising out of the illegal, anticompetitive and monopolistic practices and activities of Defendants which have violated and continue to violate the Colorado and federal antitrust laws by engaging in an integrated series of predatory and exclusionary acts and strategies designed to raise barriers to TVCN's entry and expansion into Defendants' field of economic activities, and otherwise entrench themselves as monopolists by anticompetitive conduct thereby injuring the competitive process and compeitors [sic], and ultimately, the consumers.

IV. STRUCTURE OF THE MARKET AFFECTED

15. Defendant ESPN is involved in the manufacturing, production and wholesale supplying of National Premium Sports Programming ("NPSP") for subscription or non-broadcast television. The ESPN Channel is referred to as a "cable network". ESPN is sometimes referred to as a "programmer". The ESPN programming is also referred to as the ESPN Channel.

16. The ESPN programming is transmitted to a certain satellite or satellites and retransmitted back to continental United States. The ESPN Channel is encoded such that only authorized distributors or "affiliates" are allowed to receive it. With limited exceptions, the only affiliates that are authorized to receive the ESPN Channel are cable TV operators.

17. Cable TV operators can receive the ESPN Channel, along with many other satellite channels, by means of satellite receiving equipment, and retransmit or distribute such channels locally on coaxial cables to viewers or "subscribers" who pay certain monthly fees for the right to receive the programming of said channels. The monthly fees are collected from subscribers by the cable TV operators. Portions of said fees are then passed on to ESPN.

18. An affiliate can physically be authorized or refused the authorization to receive either the ESPN Channel or the TNT Channel by means of pushing a few push-buttons into a computer which are under the control of ESPN and TNT, respectively.

19. Defendant TNT also is involved in the manufacturing, production and wholesale supplying of National Premium Sports Programming ("NPSP") for subscription or non-broadcast television. In addition, TNT's programming includes movies and other entertainment programs. The TNT Channel is referred to as a "cable network". TNT is sometimes referred to as a "programmer". The TNT programming is also referred to as the TNT Channel.

20. The TNT Channel is in many ways similar to the ESPN Channel, in that it is received only by authorized affiliates via a satellite, and retransmitted or distributed locally on coaxial cables to subscribers for monthly fees.

21. Defendant United Artists Entertainment Co. ("UAE") is a cable TV operator operating, on an exclusive basis, cable TV systems in various cities in Metro Denver that include Arvada, Aurora, Castle Rock, Cherry Hills,

Commerce City, Englewood, Federal Heights, Golden, Greenwood Village, Lakewood, Parker, and Westminster, Colorado. UAE is a cable monopolist in each of the foregoing cities with a market share of subscription television approaching 100%. In other words, almost 100% of subscription (non-broadcast) television viewers or "subscribers" in said cities are controlled by UAE.

22. Defendant Mile Hi Cablevision ("Mile Hi") is a cable TV operator operating, on an exclusive basis, cable TV systems in the City of Denver and the City of Glendale, Colorado. Mile Hi is a cable monopolist in each of Denver and Glendale with a market share approaching 100% of subscription television. Almost 100% of subscription television viewers or "subscribers" in each of the City of Denver and Glendale are controlled by Mile Hi.

23. Defendant ATC is the second largest cable TV operator in the United States. American Cablevision is either a trade mark or otherwise wholly-owned or substantially owned by ATC. ATC is the alter ego of American Cablevision. Thus, ATC, through American Cablevision, is the cable TV operator operating, on an exclusive basis, cable TV systems in Littleton, Mountain View, Northglenn, Thornton and Wheat Ridge, Colorado. ATC is the cable TV monopolist in each of these cities with a market share approaching 100% of subscription television. Almost 100% of subscription television viewers in these cities are controlled by ATC.

24. Defendant TCI is the largest cable TV operator in the United States. TCI, directly or through wholly-owned subsidiaries, is the exclusive cable TV operator in the City of Boulder and the City of Edgewater, Colorado

with a market share of subscription television viewers approaching 100%.

25. Defendant Scripps Howard Communications ("Scripps") is one of the largest cable TV operators in the United States. Through Scripps Howard Cable Co., Scripps is the exclusive cable TV operator in Lafayette, Louisville, Fort Lupton and Berthoud, Colorado. Scripps is the cable TV monopolist in said cities with a market share of subscription television viewers approaching 100%.

26. The foregoing cities are part of Colorado known as the Denver Metropolitan Area. The relevant geographical market in this Complaint is the Denver Metropolitan Area ("Metro Denver").

27. Subscription television or cable TV subscription in Metro Denver is a relevant product market. This market is monopolized by Defendants TCI, ATC, UAE, Mile Hi and Scripps with a monopoly power approaching 100% in each of their respective cities.

28. The National Premium Sports Programming of Defendants ESPN and TNT is carried by every cable TV operator in Metro Denver. Almost every cable TV subscriber in Metro Denver who subscribes to one of the foregoing cable monopolists, receive both the ESPN Channel and the TNT Channel. The National Premium Sports Programming ("NPSP") is another relevant product market.

29. The NPSP of the ESPN Channel and the TNT Channel are two distinct programming products. The

video programs offered on the ESPN Channel are different and exclusive from those offered on the TNT Channel. This is the reason why subscribers subscribe to both Channels, not just one or the other. Neither Channel is a substitute for the other. Each one has its own exclsuive and unique sports and championship games and events.

30. Defendant ESPN has exclusive agreements with certain leagues to cablecast (broadcast for subscription television) many sports events. In January 1989, ESPN acquired from the Major League Baseball the exclusive right to cablecast some 175 games of baseball per year for a period of four years. The number 1 ratings winner in cable programs for the first quarter of 1989 was ESPN's coverage of the Pro Bowl of the National Football League ("NFL"). The 1989 Pro Bowl was the last of a 3-year exclusive agreement between the NFL and ESPN. ESPN has signed a new exclusive agreement with the NFL to cablecast the Pro Bowl games and three exhibition professional football games in each of the football seasons from 1990 through 1993. This is in addition to the cable casting of some 35 regular professional football games during said period. On or about July 17, 1989, ESPN announced its College Football Association ("CFA") schedule, for the 1989-1990 football season of some 27 college football games. On the same date, ESPN announced the signing of a multi-year agreement with the Senior Professional Golf Association to cablecast a minimum of 14 events per year beginning in 1990. Other exclusive agreements include the cablecasting of the U.S. Open Championship, the U.S. Women's Open Championship and U.S. Amateur Championship. Under an exclusive arrangement with the National Collegiate Athletic Association, ESPN has

increased its cablecast of 214 games of basketball in 1989-90 season to 236 basketball games in the coming year. These games feature the ACC, Big East, Big Ten, Metro, SEC, Big 8, Pac-10, Big West and Atlantic 10 Conferences. Defendant ESPN has other exclusive agreements covering many sports events. The ESPN Channel is in and by itself a relevant product submarket or even product market.

31. The ESPN Channel is a unique cable network. Many subscribers would not subscribe to subscription television if the ESPN Channel is not available. Virtually, every cable TV operator in the United States, including the cable-TV-operator Defendants in Metro Denver, distribute the ESPN Channel to its subscribers. When the ESPN Channel or TNT Channel were included in the "basic-services" package, 100% of cable TV subscribers receive both channels. When some cable TV operators took both Channels out of the basic-services package, and offered them as part of another package for extra or additional monthly subscription fees, almost 100% of basic subscribers elected to take both the ESPN Channel and the TNT Channel for the additional fees. The market share of ESPN in the subscription television industry in Metro Denver approaches 100% of subscribers. Without the ESPN Channel, a cable TV operator cannot succeed. Any competitor to a cable TV operator must carry the ESPN Channel, and must be authorized to distribute the ESPN Channel to subscribers, otherwise such competitor will be severely disadvantaged.

32. Defendant TNT has exclusive agreements of its own to cablecast many sports events. For example, TNT has the exclusive right to carry many of the National

Basketball Association ("NBA") games, the exclusive rights to carry the 1991 Pan Am games, the exclusive rights to carry the 1992 and the 1994 Winter Olympics and the exclusive rights to carry the 1990 World Cup Soccer. TBS has recently announced that the TNT Channel will carry 47 NFL games between 1990 and 1993 (three pre-season games and half the regular season games for each of the four years). Almost every cable TV operator in Metro Denver carries the TNT Channel, and almost every cable subscriber in Metro Denver receives the TNT Channel. When the ESPN Channel or TNT Channel were included in the "basic-services" package, 100% of cable TV subscribers receive both channels. When some cable TV operators took both Channels out of the basic-services package, and offered them as part of another package for extra or additional monthly subscription fees, almost 100% of basic subscribers elected to take both the ESPN Channel and the TNT Channel for the additional fees. The market share of TNT Channel is approaching 100% of cable TV subscribers in Metro Denver. Indeed, the TNT Channel, also, is in and by itself a product submarket or even a product market. It is common knowledge that when the public thinks of subscription television they immediately think of the ESPN Channel and the TNT Channel.

33. Defendant Capital Cities/ABC, Inc. ("ABC") is an 80 percent owner of Defendant ESPN. ABC's main line of business includes the broadcasting of news, information and entertainment. The ABC programming is transmitted via microwave frequencies to a satellite, which retransmits the programs back to continental United States. The programs are then received by distributors or

affiliates by means of satellite receiving equipment. The affiliates then broadcast the ABC programs locally on standard Very High Frequencies ("VHF") or Ultra High Frequencies ("UHF"). Gannett Broadcasting Group is ABC's affiliate in Metro Denver. Gannett is licensed to operate on Channel 9. Thus, the ABC's programming is broadcast locally by the ABC's affiliate on Channel 9 in Metro Denver. Both VHF and UHF television signals can be received off-the-air by standard antennas and television sets free of charge. This is referred to as free broadcast television. ABC generates revenues by selling commercial advertisements that are inserted between its programs and broadcast therewith. The rate charged to advertisers by ABC is a function of the number of viewers that may be watching the ABC's programming as measured by the Nielsen ratings. As the number of viewers, as estimated by the Nielsen ratings, is increased or decreased, the higher or lower is the advertisement rate. Thus, a distributing system that takes viewers away from watching the ABC programming is a competitor to ABC. Subscription television is competing against ABC, NBC and CBS for viewers. For this reason, ABC and the other two broadcast networks, CBS and NBC, initially opposed the introduction of subscription television. As subscription television grew stronger, the network ABC decided to join the subscription television industry instead of fighting it. ABC has owned and operated one or more cable TV systems. ABC has acquired an 80 percent (80%) ownership interest of ESPN, which includes management and veto power. Therefore, ABC owns and controls 80% of the relevant market or submarket of the ESPN Channel.

34. Coaxial cable is one means of distributing the ESPN Channel, TNT Channel, and other cable networks or channels to viewers or subscribers. Satellite Master Antenna TV ("SMATV") systems are mainly used to distribute cable networks in apartment complexes and hotels. Home satellite dishes (backyard dishes or TV-Receive-Only ("TVRO")) systems are utilized to receive satellite programming (cable networks) directly from satellites. There are other delivery systems that have had little or no success. In addition, because of the high expenses associated with SMATV and TVRO systems, neither one of these two delivery systems have had much impact in competing against coaxial cable TV systems, which remain the main source of delivering subscription television to potential subscribers. In Metro Denver, coaxial cable television amounts to more than 98% of subscription television.

35. A new technology has been developed as an alternative to conventional or coaxial cable TV. The new technology employs microwave frequencies as the means of delivering satellite channels for local distribution to potential subscribers. The new technology began to appear in 1984 when the Federal Communications Commission ("FCC") reallocated the use of the frequency spectrum. The FCC gave the designation ITFS (Instructional Television Frequency Service [sic] for a certain band of microwave frequencies. MMDS (Multichannel Multipoint Distribution Service) is another designation given to another band of microwave frequencies. OFS (Operational Fixed Service) is a third designation given to another band of microwave frequencies. An ITFS station is a television station licensed by the FCC to broadcast

multiple TV channels on microwave frequencies in the ITFS band. An MMDS operator is one that operates an FCC-licensed television station that broadcast on MMDS frequencies. A wireless cable TV station is one that employs microwave frequencies from the ITFS band, MMDS and/or other bands of frequencies. A wireless cable TV station usually carries more than one FCC license.

36. The Plaintiff, TVCN, is a wireless cable TV ("WCTV") operator. Pursuant to FCC licenses, TVCN has constructed a microwave TV station at Eldorado Mountain that broadcasts multiple TV channels on microwave frequencies offering cable TV programming to the people of Metro Denver. Similar to a conventional cable TV system, the new WCTV station receives satellite programs (cable channels or networks) from satellites by means of satellite receiving equipment. However, instead of delivering such channels to subscribers through coaxial cables, the new WCTV station broadcasts the satellite programs on microwave frequencies over-the-air to potential subscribers. Standard TV sets cannot receive the microwave TV signals without special equipment. One must subscribe to the new WCTV service in order to receive a small microwave antenna and associated-electronics for reception.

37. According to the Arbitron, the Area of Dominant Influence in Metro Denver has approximately 1,037,000 homes of which about 850,000 homes have been passed by coaxial cables. Conventional cable TV services are not currently available to the remaining 187,000 homes in Metro Denver. Conventional cable TV services may never become available for these uncabled homes

because the population pattern of such uncabled areas may make it economically not feasible for the introduction of coaxial cable.

38. Since the WCTV signal is broadcast over the air without the need for underground or overhead cables, most people in Metro Denver will be able to receive the new WCTV services. This includes homes that are in the cabled and uncabled areas.

39. The WCTV signal offers subscribers better quality reception and better customer service since the WCTV system is more reliable, and less susceptible to noise, corrosion and interruption. In addition, the cost of the WCTV system is much lower than that of the capital-intensive coaxial cable TV system. Thus, a WCTV system, such as that of TVCN, can deliver satellite programming to potential subscribers at much lower subscription rates than those being charged by any of the cable TV operators in Metro Denver.

40. Potential subscribers who elect to subscribe to the WCTV of TVCN in Metro Denver fall in three categories. The first category includes existing subscribers to one of the cable TV operators in Metro Denver, who may elect to switch to TVCN's services for any number of reasons. The second category includes people who live in areas that have been cabled, but have not subscribed to cable TV. These are present non-subscriber homes that were passed by cable TV operators and have not subscribed to cable TV services but who may elect to subscribe to TVCN's services. The third category includes people who live in areas that have not been cabled or may never be cabled. These are normally people who live

in sparsely populated areas that are not economically feasible to cable.

41. In Metro Denver, there are approximately 187,000 homes that fall in the foregoing third category in that they are homes in uncabled areas. The only way that these uncabled homes in Metro Denver currently can receive cable TV programming (subscription television) at reasonable prices comparable or more competitive than those of conventional cable TV is through a WCTV system. TVCN is the only competitor in Metro Denver operating a WCTV system that is willing to deliver subscription television to those uncabled homes, and compete against cable TV operators (cable Defendants) in the cabled areas of Metro Denver.

V. CONDUCT GIVING RISE TO VIOLATIONS OF LAW

A. OVERVIEW

42. On November 1, 1988, the Plaintiff, TVCN, entered into an affiliation agreement "(Affiliation Agreement") with Defendant ESPN for the purpose of offering the ESPN Channel along with other satellite channels or cable networks to potential subscribers in an apartment complex utilizing a Satellite Master Antenna TV ("SMATV") system as the means of distribution.

43. Prior to and after the signing of the Affiliation Agreement, TVCN expressed its interest and continued requesting authorization to receive the ESPN Channel for the purpose of distributing the ESPN Channel over

TVCN's Wireless Cable TV ("WCTV") station serving the entire Metro Denver Area.

44. ESPN informed TVCN that an authorization to receive the ESPN Channel for the purpose of distributing the channel over a WCTV station required a separate agreement and additional documentation about the WCTV station. ESPN also informed TVCN that TVCN would have no problem getting such authorization from ESPN.

45. During many months following the signing of the Affiliation Agreement, ESPN requested many documentations from TVCN for the purpose of making a decision to authorize TVCN to expand the distribution of the ESPN Channel by TVCN from a single apartment complex to the entire area of Metro Denver.

46. After the signing of the foregoing Affiliation Agreement and making the necessary payments by TVCN to ESPN, TVCN expected ESPN to act in good faith and to be fair. TVCN submitted, at a great expense, all documentations requested by ESPN. ESPN acknowledged receiving said documentations, but refused to inform TVCN of any decision as to whether or not TVCN would be authorized to receive the ESPN Channel for carriage on TVCN's new WCTV station.

47. TVCN continued to make the payments to ESPN as required under the Affiliation Agreement. All payments have been made by TVCN to the satisfaction of ESPN from November, 1988 to the present.

48. The terms of the Affiliation Agreement were discriminatory against TVCN and were heavily favorable

to ESPN. The price of making the ESPN Channel available to TVCN is much higher than those prices charged to cable TV operators for the same product in the same area. In addition, a periodical increase (every 5 or 7 months) in said price is built in the Affiliation Agreement. For example, in November 1988, the rate charged to TVCN by ESPN started at $0.43 per month per subscriber. The rate jumped to $0.48 in August 1989, $0.50 in January 1990 and $0.65 in November, 1990. This is an increase of more than 51% from November 1988 to November 1990. Thereafter, the price is open for any increase. Further, the Affiliation Agreement gives ESPN the right to increase said rate up to 30% per year. TVCN cannot cancel the Affiliation Agreement unless the foregoing rate of increase is more than 30% over the previous year. There are other unfair and unreasonable restrictions imposed upon TVCN in the Affiliation Agreement.

49. Pursuant to the foregoing Affiliation Agreement, TVCN is further restricted from expanding its services with the ESPN Channel carriage beyond the one apartment complex, in order to prevent TVCN from competing against any of the cable-TV-operator Defendants. However, any of the cable-TV-operator Defendants are allowed and authorized by Defendant ESPN to compete against TVCN inside the one apartment complex where the cable TV operator has (a) the ESPN Channel at a lower cost than that charged by ESPN to TVCN, and (b) the TNT Channel which is not available to TVCN.

50. In addition to the geographical limitation, there is a price discrimination against TVCN. Pursuant to said Affiliation Agreement, the price charged by ESPN to TVCN is currently $0.65 per month per subscriber. Based

on information and belief, the same product is offered to cable-TV Defendants for less than $0.47 per month per subscriber. This price discrimination is designed, by Defendant ESPN, willfully and intentionally, to lessen competition, impair, injure and ultimately destroy the competition, and to allow cable-TV-operator Defendants to entrench, maintain, and enlarge their monopoly power.

51. In order to compete, a competitor must offer potential subscribers an array of satellite programming comparable to that which is offered by competitor cable TV operators. By far, the most popular and unique channels of all satellite channels are the ESPN Channel and TNT Channel. When these two channels were offered as part of the "Basic Services", 100% of the subscribers received them. When cable TV operators removed said two Channels from the basic package, and included them in another package as an "expanded service", "preferred service", "option service", or a "second tier service", for additional monthly fees, almost 100% of the subscribers elected to pay the additional fees and subscribe to the ESPN Channel and TNT Channel. These two Channels are the only National Premium Sports Programming channels available for subscription television. No one can compete against any cable TV operator without having access to the ESPN Channel and TNT Channel. The ESPN Channel and the TNT Channel are "essential facilities" for subscription television. Accordingly, TVCN had no choice but to sign the foregoing Affiliation Agreement with ESPN upon the unreasonable prices and terms that are set forth and controlled by ESPN. TVCN relied upon ESPN's representations and indications that TVCN could acquire the ESPN Channel for WCTV.

52. In Satellite Master Antenna TV ("SMATV") systems, satellite receiving equipment and distribution equipment (collectively "Head-end Equipment") are used for each apartment complex. Thus, in order to provide subscription television services to other apartment complexes, TVCN would have to construct Head-end Equipment for each complex. However, with the WCTV station, only one set of Head-end Equipment is needed at the station. All cable TV programs are then broadcast over the air to potential apartment complexes. In addition, as the WCTV signals are broadcast, the signals become available to all potential subscribers throughout Metro Denver.

53. TVCN informed ESPN of the economical disadvantage of constructing Head-end Equipment in each apartment complex for the delivery of subscription television, and that it would be more economical to construct only one set of Head-end Equipment at a WCTV station, which would then broadcast all available satellite channels over the air to all apartment complexes as well as residents in Metro Denver. This expansion, required ESPN's prior approval. TVCN continued its efforts to convince ESPN to allow TVCN to extend its geographical service area from a single apartment complex to cover other apartmenet [sic] complexes and the entire area of Metro Denver. To the present, ESPN has continuously refused.

54. Commencing November, 1988, and continuing to the present, Defendant TNT also has refused to authorize TVCN to receive the TNT Channel for the purpose of offering it to all potential subscribers in Metro Denver.

55. On August 2, 1990, TNT admitted to TVCN that TNT has entered into exclusive agreements with cable TV operators to exclude WCTV operators from receiving the TNT Channel, and until and unless Defendants TCI, UAE, ATC, Mile Hi and Scripps, being the cable TV operators in Metro Denver, agree to authorize TVCN to receive the TNT Channel, TNT will not authorize TVCN to receive the TNT Channel.

56. TVCN has requested from TCI, UAE, ATC, Mile Hi and Scripps authorization to receive the ESPN Channel and the TNT Channel, but was denied access to either one of said channels.

57. TVCN is a wireless cable TV operator. TVCN is in the business of offering cable TV programming to potential subscribers in Metro Denver. TVCN is a competitor to Defendants TCI, UAE, ATC, Mile Hi and Scripps.

58. Defendants TCI, the largest cable TV operator in the United States, ATC, the second largest cable TV operator, UAE, the third largest cable TV operator, and Scripps, one of the largest cable TV operators in the United States, are four of the five major cable MSO's that own and control more than 50% of TBS, the parent company of TNT. TBS is the alter ego of TNT. This causes the effect of a horizontal competition between TVCN and TNT.

59. ESPN is 80% owned by Defendant Capital Cities/ABC, Inc. ("ABC"). The other 20% is owned by a passive investment firm by the name of RJR Nabisco, Inc. ABC dominates, controls and substantially influences the management and business affairs of ESPN with a common goal and a unity of interest. ABC is in the broadcast

business. ABC's revenues are affected by the number of viewers attracted to watch the ABC's programming. In Metro Denver, the ABC's programming is broadcast locally through Channel 9, the affiliate of ABC. To the extent viewers are lost to watch cable TV programming, the number of viewers that would normally watch Channel 9 in Metro Denver is reduced. As TVCN broadcasts its WCTV services to the public in Metro Denver, viewers who subscribe to TVCN's services are effectively spending less time on or may be turning away from watching the ABC's programming. Therefore, TVCN is also competing with ABC. This causes the effect of a horizontal competition between TVCN and ESPN. Both ABC and TVCN broadcast their TV signals over the air. Both ABC and TVCN compete against each other in getting their respective viewers. So long as ABC remains in control of ESPN and the ESPN Channel market, ABC through ESPN, will conspire, agree or combine with other Defendants to boycott TVCN to the detriment of the competitive process, competitors and consumers.

B. A GROUP BOYCOTT

60. The Defendants are aware of the subscribers' demand for the ESPN Channel and the TNT Channel, the two Channels' unique and distinct National Premium Sports Programming, and their essential inclusion in any successful package of cable TV programming for subscription television. The ESPN Channel and TNT Channel are the only two cable TV channels that offer National Premium Sports Programming for cable subscription. Without having access to these two National Sports

Channels, TVCN, as a competitor will not be able to compete against any of the Defendants.

61. The Defendants are aware of the technical superiority and low-cost of the wireless cable TV system as a reliable means of delivering cable TV programming to potential subscribers, and TVCN's low subscription rates as charged to TVCN's subscribers. With access to the ESPN Channel and the TNT Channel, TVCN could have a competitive advantage in the relevant markets, and could spoil Defendants' plan of price fixing.

62. The Defendants have agreed not to authorize TVCN to receive and offer the ESPN Channel and the TNT Channel to the people of Metro Denver, thereby making it impossible for TVCN to compete with Defendants TCI, UAE, ATC, Mile Hi, Scripps and ABC.

63. The Defendants have agreed to deprive TVCN access to the essential product of ESPN and TNT to prevent its entrance into the Denver market, and have agreed to group boycott TVCN to the detriment of consumers in Metro Denver.

C. PRICE FIXING

64. Each of the Defendants TCI, UAE, ATC, Mile Hi and Scripps is a cable monopolist and possesses monopoly power approaching 100% in each of their respective cities within Metro Denver.

65. Prior to the Cable Act of 1984 going into effect, in which Act Congress deregulated the cable industry, fees of cable TV programming and cable TV services were reasonable because they were regulated. After such

deregulation went into effect in 1986, the fees of cable TV programming and cable TV services began to escalate.

66. Prior to 1986, Defendant ATC was offering subscribers "basic services" at monthly fees ranging from $8.92 to $9.50 per subscriber. The number of cable TV channels in the basic-services package varies from 42 to 49. In the City of Wheatridge, the basic services of 47 channels were offered at monthly fees of $8.92 per subscriber before deregulation. After the deregulation, the fees began constantly going higher. Since there has been no competition against ATC in any of the cities in which it operates, ATC continued to increase its rates and decrease its output. In Wheat Ridge, the number of cable TV channels included in the basic services were reduced from 47 in 1986 to 43 in 1990, but the monthly fees went up from $8.92 to $16.45. Despite the reduction in the output, the price of basic services went up 84 percent (84%) from 1986 to 1990. After deregulation, in the Cities of Northglenn and Thornton, Colorado, ATC's prices for a package of basic services went up from $9.50 to $16.45 while the number of channels went down from 49 to 43 channels. Similar examples exist in each of the other cities in which ATC operates as a cable TV monopoly within the relevant market in which ATC and other Defendants are boycotting and excluding TVCN.

67. Defendant UAE, the third largest cable TV operator in the country, and the largest cable TV operator within the relevant market, was offering its basic services of 54 cable channels for monthly fees of $11.95 per subscriber prior to 1986. In 1990, the number of cable TV channels of UAE's basic services has been reduced from 54 to 49, but the monthly fees for such basic services have

been increased to $19.45 per subscriber, an increase of almost 63 percent in four years.

68. Similar examples exist in other cities in Metro Denver in which other cable TV Defendants operate.

69. In contrast, TVCN is currently offering its basic services at monthly fees of $11.95 per subscriber with comparable or better quality reception, more reliable delivery system, and better customer service. TVCN surveyed some 26,000 people in Metro Denver, of which approximately 79% expressed varying degrees of interest to switch from conventional cable TV to the new wireless cable TV of TVCN, provided that the new services are comparable with the conventional cable TV services. The new services will not be comparable unless the ESPN Channel and TNT Channel become available to TVCN.

70. However, when the installations began, and potential subscribers discovered that TVCN's package of cable TV channels did not include the ESPN Channel and the TNT Channel, many of the would-have-been subscribers elected not to subscribe until such time as the ESPN Channel and the TNT Channel are offered. In addition, initial subscribers who signed up with TVCN under the premise that at least the ESPN Channel might become available at a later date finally gave up on such a possibility and terminated their subscription with TVCN after it became clear to them that the ESPN Channel might not become available any time soon. Further, many of the existing subscribers are threatening to terminate their subscription with TVCN unless the ESPN Channel and/or the TNT Channel become available soon.

71. Cable TV operators in Metro Denver view TVCN as a competitive threat to their 100% monopoly. The presence of TVCN in a competitive environment would, more likely than not, prevent Defendants from steadily increasing prices and decreasing output.

72. As cable TV operators, the Defendants TCI, UAE, ATC, Mile Hi and Scripps collect monthly subscription fees from subscribers, portions of which fees are passed on to Defendants ESPN and TNT. The higher the fees charged to subscribers by cable TV monopolists, the higher are the portions of said fees are passed on to ESPN and TNT.

73. For example, prior to 1986, the monthly fees that were passed on from cable TV operators to ESPN for receiving the ESPN Channel were about $0.10 per month per subscriber. By 1990, said monthly fees were increased to as high as $0.47 per subscriber. Monthly fees charged by ESPN for the ESPN Channel to non-cable TV operators such as SMATV operators are in excess of $0.65 per month per subscriber.

74. In the absence of antitrust violations by Defendants, conspiracy, price fixing, boycotting and the exclusionary measures as conducted by Defendants, it would make more business sense for Defendants ESPN and TNT to deal with TVCN and authorize TVCN to receive their channels for the purpose of offering said channels to potential subscribers in Metro Denver. TVCN can promote their product throughout Metro Denver, increase the number of subscribers for both ESPN and TNT, improve quality reception and generate more satisfied

subscribers, which would then generate more revenues and profits for ESPN and TNT.

75. In the event that Defendants are allowed to continue restraining trade, and foreclosing competition and violate the laws, no one else will be able to compete with them, and they will harm the competitive process, competitors and consumers. They will continue increasing prices and reduce output unless they are enjoined.

76. Without access to the ESPN Channel and the TNT Channel, TVCN cannot compete against Defendants TCI, UAE, ATC, Mile Hi and Scripps within the cabled areas of Metro Denver. The entire business viability of TVCN will be undermined without access to the ESPN Channel and TNT Channel. In the absence of TVCN's services in the uncabled areas, the entire population of those uncabled areas within Metro Denver will be deprived and totally foreclosed from being able to receive the ESPN Channel, TNT Channel and other satellite programming services at reasonable cost. The only option left for such uncabled homes would be to purchase their own satellite dishes and associated electronics at a cost that runs into the thousands of dollars for each subscriber. Even if one purchases a satellite dish and related electronics at such a high price, a potential-owner of such dish still has to pay monthly subscription fees to receive the ESPN Channel or TNT Channel.

VI. CO-CONSPIRATORS

77. All the Defendants are co-conspirators. Defendants TCI, ATC, UAE, Mile Hi and Scripps are major MSO's that own and control TBS which is the parent

company of TNT. TBS is the alter ego of TNT in that TBS (a) owns and controls the affairs of TNT, and (b) has a common goal and unity of purpose and interest with TNT. It is known to the Plaintiff that the foregoing MSO's and TNT have conspired to boycott TVCN in order to allow TCI, UAE, ATC and Scripps to entrench their monopoly powers in Metro Denver. TBS, being the alter ego of TNT is not made a defendant, but is named as a co-conspirator.

VII. VIOLATIONS ALLEGED

78. On or about November 1, 1988, Plaintiff TVCN entered into an affiliation Agreement ("Affiliation Agreement") with Defendant ESPN authorizing TVCN to receive the ESPN Channel. The Affiliation Agreement limits TVCN's ability to distribute the ESPN Channel to potential subscribers in a single apartment complex by means of an SMATV system confined within the private property of the complex.

79. ESPN has refused to authorize TVCN to expand its service area from a single apartment complex in the City of Denver to the entire area of Metro Denver, in that ESPN has refused to authorize TVCN to receive the ESPN Channel for the purpose of including the ESPN Channel in TVCN's package of satellite programming, which is being broadcast over the WCTV of TVCN serving the entire area of Metro Denver.

80. Defendant TNT, also, has refused to authorize TVCN to receive the TNT Channel for the purpose of

including the TNT Channel in TVCN's package of satellite programming as offered to potential subscribers throughout Metro Denver.

81. The relevant geographic market is the Denver Metropolitan Area ("Metro Denver"). The relevant product market is subscription television, which includes the ESPN and TNT Channels.

82. The ESPN Channel and the TNT Channel are offered to subscribers as part of a subscription television package(s).

83. The ESPN Channel is a National Premium Sports Programming channel with many exclusive sports events and documentaries that cannot be obtained from any sources or seen on any other network or channel except the ESPN Channel. The ESPN Channel is so unique, distinct and in demand by the viewing public ("subscribers") that the ESPN Channel is in and by itself a relevant product submarket or product market.

84. The TNT Channel is another National Premium Sports Channel with many exclusive sports events and documentaries (different from those of the ESPN Channel) that cannot be obtained from any sources or seen on any other channel or network except the TNT Channel. The TNT Channel is so unique, distinct and in demand by subscribers that the TNT Channel is in and by itself a product submarket or product market.

85. The ESPN Channel and the TNT Channel are the only National Premium Sports Programming channels available and offered to subscribers in Metro Denver.

86. Almost every cable TV operator in Metro Denver, and indeed throughout the United States, carries and offers to subscribers the ESPN Channel and the TNT Channel.

87. Almost 100% of subscribers who subscribe to cable TV systems in Metro Denver, subscribe to and receive the ESPN Channel and the TNT Channel. When the public think of subscription television, they immediately think of the ESPN Channel and the TNT Channel.

88. The ESPN Channel and the TNT Channel are "essential facilities" to subscribers in Metro Denver.

89. In order to compete against cable TV operators in Metro Denver, a competitor must be able to offer potential subscription television subscribers in Metro Denver an array of programming channels that must be comparable to those channels that are offered by cable TV operators.

90. No competitor can ever compete against cable TV operators in Metro Denver unless the competitor is authorized to receive the ESPN Channel and the TNT Channel and include such channels in its subscription television services.

91. Defendant UAE is the sole and exclusive cable TV operator in many cities in Metro Denver that include Arvada, Aurora, Castle Rock, Cherry Hills, Commerce City, Englewood, Federal Heights, Golden, Greenwood Village, Lakewood, Parker and Westminster. UAE is a cable monopolist in each of said cities and possesses a monopoly power with a market share approaching 100% of the subscription television viewers in said cities within

Metro Denver. UAE is the largest cable TV operator in Metro Denver, and the third in the United States. UAE is more than 50% owned and controlled by TCI.

92. Defendant Mile Hi is the sole and exclusive cable TV operator in the cities of Denver and Glendale. Mile Hi is a cable monopolist in each of these two cities, and possesses a monopoly power with a market share approaching 100% of the subscription television in said two cities within Metro Denver. Mile Hi is largely owned and controlled (in excess of 50%) by TCI and ATC.

93. Defendant ATC is the second largest cable TV operator in the United States. ATC, through American Cablevision, is the cable TV operator operating, on an exclusive basis, cable TV systems in various cities in Metro Denver that include Littleton, Mountain View, Northglenn, Thornton and Wheat Ridge. ATC is the cable TV monopolist in each of these cities with a market share approaching 100% of subscription television in said cities within Metro Denver. ATC is one of the MSO's that owns and controls more than 50% of TBS, the parent company of TNT.

94. Defendant TCI is the largest cable TV operator in the United States. TCI, directly or through wholly-owned subsidiaries, is the exclusive cable TV operator in the City of Boulder and the City of Edgewater with a market share of subscription television viewers approaching 100%. TCI owns and controls more than 50% of UAE, and is one of the major MSO's that owns and controls more than 50% of TBS, the parent company of TNT.

95. Defendant Scripps Howard Communications ("Scripps") is one of the largest cable TV operators in the

United States. Through Scripps Howard Cable Co., Scripps is the exclusive cable TV operator in Lafayette, Louisville, Fort Lupton and Berthoud. Scripps is the cable TV monopolist in said cities with a market share of subscription television viewers approaching 100%. Scripps is one of the MSO's that owns and controls more tha [sic] 50% of TBS, the parent company of TNT.

96. Plaintiff TVCN is the only competitor offering cable networks (TV channels offered by cable TV operators for subscription television) over a wireless cable TV (WCTV) station to potential subscribers in Metro Denver in direct competition, at the same intraband level against Defendants TCI, ATC, UAW, Scripps, Mile Hi and other cable TV operators.

97. Based on information and belief, Mile Hi is more than 50% owned and controlled by TCI and ATC.

98. Based on information and belief, Defendants TCI, ATC, UAE and Scripps, directly or indirectly, make up most of the major cable TV operators (MSO's) that own and control more than 50% of TBS. TBS is the parent company of TNT, which owns and controls 100% of the TNT Channel. TBS is the alter ego of TNT in that (a) TBS dominates and controls the business affairs of TNT, and (b) TBS and TNT have a common goal and unity of interest.

99. Although Defendant TNT is a producer of programming, and TVCN is a distributor of programming, the aforementioned intertwined ownership and control of TNT creates the effect of a horizontal competition between TNT and TVCN.

100. Each of the cable-TV-operator Defendants has complete monopoly control over the number of TV channels (output) offered to its subscribers, the selection of such channels, and over the subscription price charged to its subscribers. Each of such Defendants has the ability and monopoly power to exclude, and has excluded competitiors from entry to the market of subscription television, which includes the ESPN Channel and TNT Channel.

101. Each of the cable-TV-operator Defendants have access to the ESPN Channel and TNT Channel but has refused to sell the ESPN Channel and the TNT Channel to TVCN, and refused to allow TVCN access to the ESPN Channel and the TNT Channel for the purpose of offering the ESPN Channel and TNT Channel to existing and potential subscribers of TVCN in Metro Denver.

102. Each of the cable-TV-operator Defendants collects subscription fees from its subscribers and pass on a portion of such fees to Defendants ESPN and TNT.

103. Defendant ABC is 80% owner of ESPN. ABC controls and substantially influences management and business decisions of ESPN.

104. ABC and TVCN are competitors in that both broadcast their TV signals over the air vying for public viewers in Metro Denver.

105. Since ABC is substantially in control of ESPN, this causes the effect of making ESPN and TVCN competitors at the same horizontal level.

106. ESPN completely controls and dominates the ESPN Channel market. TNT completely controls and dominates the TNT Channel market.

107. Based on information and belief, the National Football League ("NFL") required TNT to have a minimum of 30 million subscribers before signing an exclusive agreement with TNT to cablecast some of the NFL games. Millions of dollars are spent by TNT and ESPN to acquire exclusive arrangements to cablecast many of the sports events. It is impossible for TVCN to duplicate the ESPN Channel and the TNT Channel. Because of the entry barriers, and high capital costs, there is no reasonable replacement for the ESPN Channel and TNT Channel.

108. The ESPN Channel and the TNT Channel are being broadcast from satellites and received by all cable TV operators in Metro Denver. It requires only the insertion of a simple authorization code into a computer to make the ESPN Channel available to TVCN directly from the satellite. A similar code insertion is all that is required to make the TNT Channel available for TVCN directly from the satellite. Also, it is just as easy to receive the ESPN Channel and the TNT Channel from any of the cable-TV-operator Defendants in Metro Denver.

109. The restrictive provisions of the Affiliate Agreement between ESPN and TVCN for subscribers of a single apartment complex in the City of Denver is in reality a territorial allocation to prevent TVCN from competing against other Defendants in Metro Denver, the purpose of which is to allow Defendants to entrench, increase and maintain their monopoly power within

Metro Denver in violation of Section 1 of the Sherman Act.

110. There exists exclusive agreements between the Defendants that limit the accessability of the ESPN Channel and TNT Channel mostly to cable TV operators within Metro Denver. Cable TV operators are monopolists in each of their respective cities, and no two cable TV operators exist in metro Denver that compete against each other in the same area for the same potential subscribers. These illegal agreements are territorial allocation schemes aimed at preventing competition and are in violation of Section 1 of the Sherman Act. Defendants did make a small exception where they allowed the ESPN Channel to be received by a small number of SMATV operators in certain hotels and apartment complexes and owners of home satellite dishes (TVRO), neither of which pose a real competitive threat to Defendants, their subsidiaries or parents. Said exception was not voluntarily made by Defendant ESPN. ESPN, in conspiracy, agreement combination, or understanding with other Defendants, has always refused access to any operator other than cable TV operators. In 1982, a lawsuit was filed by the Attorney General of the State of Arizona, pursuant to which a judgment was issued forcing ESPN to deal with SMATV operators in the State of Arizona. This judgment led to the foregoing exception.

111. There is no reasonable business justification for Defendant ESPN to limit TVCN's territorial allocation to a single apartment complex. The Affiliate Agreement between ESPN and TVCN was signed in 1988 for a term of two years. ESPN has already sent a new affiliation

agreement to TVCN for a new term of three years commencing November 1, 1990. All payments payable by TVCN to ESPN under the Affiliation Agreement since 1988 have been made and are current.

112. There is no reasonable business justification for Defendant TNT to refuse to authorize TVCN to receive and broadcast the TNT Channel to TVCN's existing and potential subscribers throughout Metro Denver.

113. In a competitive environment, it is in the best individual interest of both ESPN and TNT to authorize TVCN to carry the ESPN Channel and TNT Channel over TVCN's WCTV station for the purpose of offering both Channels to potential subscribers in the entire area of Metro Denver. People who may subscribe to TVCN's subscription television services fall in three categories: those who live in areas that are not cabled and may never be cabled, those who live in areas that are passed by coaxial cables but have elected not to subscribe to the subscription television services of conventional or coaxial cable TV operators, and those who are current subscribers but simply elect to switch to the new services of TVCN. TVCN can promote the ESPN Channel and TNT Channel throughout Metro Denver, increase subscriber base, and generate more revenues and profits for ESPN and TNT.

114. Defendants have engaged in a continuing agreement, combination, conspiracy and concerted action to restrain trade and commerce by their terms of territorial restrictions which provide that only cable TV operators are allowed to receive the ESPN Channel and the

TNT Channel in violation of Section 1 of the Sherman Act.

115. Defendants have engaged in a continuing agreement, combination, conspiracy and concerted action in restraint of trade and commerce by boycotting TVCN in violation of Section 1 of the Sherman Act.

116. Defendants have engaged in a continuing agreement, combination, conspiracy and concerted action to refuse to sell the ESPN Channel and the TNT Channel ("essential facilities") to TVCN in order for Defendants to reap maximum monopolist profits in Metro Denver in violation of Section 1 of the Sherman Act.

117. This agreement, combination, conspiracy and concerted action will continue and reoccur unless the relief hereinafter requested is granted.

118. Defendant ESPN is a monopolist and has complete control of the relevant market of the ESPN Channel, and possesses monopoly power with a market share of 100%.

119. Defendant TNT is a monopolist and has complete control of the relevant market of the TNT Channel, and possesses monopoly power with a market share of 100%.

120. Defendants ESPN and TNT have engaged, willfully and intentionally, in unlawful conduct to monopolize and have monopolized the markets of the ESPN Channel and TNT Channel, respectively, and have abused and misused their monopoly power in said respective markets to gain competitive advantage, and have

restrained trade unreasonably, all in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

121. Defendants, ESPN and TNT, possess monopoly power in the market for the ESPN Channel and TNT Channel, respectively, in Metro Denver, and have, willfully and intentionally obtained, maintained and exercised monopoly power by having engaged in illegal territorial allocations, refusing access to essential facilities, and in anticompetitive, exclusionary, boycott, price-fixing and unfair acts as set forth above.

122. The foregoing conduct and acts by ESPN and TNT are unreasonable, against their own individual interest, and cannot be pro-competitive at either the intraband or interband level.

123. At the intraband level, TVCN is the only viable competitor in Metro Denver, with an alternative technology capable of offering subscription television to potential subscribers throughout Metro Denver at much lower prices than those prices offered by any of the cable TV operators. Excluding TVCN will be the elimination of the only viable competitor against cable-TV-operator Defendants in Metro Denver.

124. Cable TV operators historically do not and have never competed against each other in the same area for the same customer within Metro Denver. The exclusion of TVCN will not alter said historical fact. The exclusion of TVCN, the territorial allocations, and other acts and conduct cannot be pro-competitive.

125. The historical data of subscription television fees establishes that cable-TV-operator Defendants have

increased their prices to the public by as much as 84% between 1986 and 1990. The portions of such fees that are passed on to ESPN, for example, from cable TV operators have increased by more than 250%.

126. As to interband competition, there are many cable TV channels (networks) that are currently offered to subscribers, however, there are only two that carry National Premium Sports Programming ("NPSP"), namely, the ESPN Channel and the TNT Channel. Because of their exclusive arrangements for football, basketball, baseball, championship games and other sports events, and the uniqueness of these sports events, the ESPN Channel and the TNT Channel are not considered by subscribers as competitors. The refusal to deal with TVCN cannot have a pro-competitive effect upon interband competition. Starting another NPSP channel requires hundreds of millions of dollars and tens of millions of subscribers just to acquire the right to cover certain sports events such as the NFL games. Further, since cable TV operators currently control the "bottleneck" for subscription television, their approval is critical to the success of such a hypothetical third NPSP Channel. Even if one is to believe that eliminating TVCN from the Metro Denver market would somehow encourage others to create another NPSP Channel, such a channel would in all likelihood be unique and distinct as the ESPN Channel and the TNT Channel, hence would not be competitive, and would have no impact on price and output. Therefore, the refusal to deal with TVCN is anti-competitive, the aim of which is to eliminate competition against Defendants to entrench their monopoly power to the detriment of consumers.

127. Defendants TCI, ATC, UAE and Scripps are cable-TV-operator monopolists in their respective franchised cities within Metro Denver, and have complete control of the market for subscription television, and possess monopoly power with market shares approaching 100% of such market in said cities.

128. The ESPN Channel and TNT Channel are under the respective control of ESPN and TNT prior to their reception directly from satellites. After the ESPN Channel and TNT Channel are received by cable-TV-operator Defendants in Metro Denver, each of such cable TV operators become another source from which the two Channels can be obtained, which source is under the control of each of the cable-TV-operator Defendants.

129. In a competitive environment, TVCN would have the choice to receive the ESPN Channel and TNT Channel directly from satellites, by means of affiliation agreements with ESPN and TNT, or from any of the cable-TV-operator Defendants in Metro Denver, by means of an affiliation agreement with such an operator.

130. Cable-TV-operator Defendants TCI, ATC, UAE and Scripps have engaged, willfully and intentionally, in unlawful conduct to monopolize the market for subscription television, which market includes the ESPN Channel market (submarket), and the TNT Channel market (submarket), and have abused and misused their monopoly power in said market to gain a competitive advantage and restraint of trade unreasonably, all in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

131. Cable-TV-operator Defendants possess monopoly power in the market for subscription television in

their respective cities in Metro Denver, and have, willfully and intentionally, obtain, maintained and exercised monopoly power by having engaged in illegal territorial allocations, refusing access to essential facilities, raising entry barriers, and in anticompetitive, exclusionary boycott, price-fixing and unfair acts as set forth above.

132. The foregoing conduct and acts of Defendants constitute a combination or conspiracy to monopolize the market for subscription television, including the ESPN Channel submarket and the TNT Channel submarket, in the United States in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

133. When Defendant ESPN limited the authorization of TVCN to receive the ESPN Channel to a single apartment complex in Denver, the prices and terms set forth in the Affiliation Agreement were discriminatory as compared to the prices and terms offered to cable-TV-operator Defendants for receiving the same product in Metro Denver.

134. The above said conduct of Defendants to conspire or combine, the overt acts in furtherance of Defendant's conspiracy or combination, and the specific intent to monopolize the market for subscription television, including the ESPN Channel submarket and the TNT Channel submarket, are all in violation of Section 2 of the Sherman Act.

135. The above-described conduct and acts of Defendants constitute an attempt to monopolize the market for subscription television, including the ESPN Channel submarket and the TNT Channel submarket. With the

specific intent to monopolize, and with the implementation of a design and strategy in furtherance of such an attempt, Defendants have engaged in such acts as, *inter alia*, a group boycott, price-fixing, territorial allocations, access refusal to essential facilities, exclusionary measures and unfair practices, and have thereby achieved a dangerous probability of success that they will obtain a monopoly in the market for subscription television in Metro Denver, including the ESPN Channel submarket and the TNT Channel submarket, if they have not already done so.

136. The purpose of the foregoing unlawful conduct and illegal acts of Defendants is to impair and ultimately destroy competition, competitive process and TVCN as the only viable competitor in Metro Denver, and to reap and continue reaping the maximum monopoly profits from consumers.

137. Plaintiff TVCN has been harmed, damaged and injured and the harm, damage and injury inflicted upon TVCN by Defendants will continue unless Defendants are enjoined and restrained, and injunctive relief is granted.

VIII. EFFECTS OF CONDUCT AND INJURY TO THE PUBLIC AND TO PLAINTIFF

138. TVCN, as a Wireless Cable TV (WCTV) operator, with an alternative technology to coaxial cable, is the only viable competitor that can and is competing against cable-TV-operator Defendants throughout Metro Denver.

139. Since the new technology of TVCN, as an alterative method of delivering subscription television to

potential subscribers, is less costly, more efficient and reliable, with better signal quality reception than those of coaxial cable TV, TVCN has been able to offer its subscription television services to existing and potential subscribers in Metro Denver at much lower rates than those offered by cable-TV-operator Defendants. The Defendants view TVCN as a competitive threat to their monopoly.

140. Defendants take the view that the competitive threat of TVCN is not limited to Metro Denver. TVCN is affiliated with other FCC's licenses and operators who have licenses to construct more than 30 wireless cable TV stations nationwide.

141. Defendants have agreed or combined to exclude, boycott, eliminate, or otherwise destroy TVCN in Metro Denver before TVCN is able to go nationwide with its competitive threat in order to allow Defendants to maximize their monopoly profits to the detriment of consumers.

142. As a direct and proximate result of the conduct and acts of Defendants, TVCN has suffered, will suffer and continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill as follows: (1) TVCN has lost existing and potential subscribers, revenues, and profits that it otherwise would have obtained in a competitive market in the absence of Defendants' conduct and acts; (2) TVCN has incurred expenses that it would otherwise not have incurred in the absence of Defendants' conduct and acts; (3) TVCN has lost business opportunities that it otherwise would have

obtained in a competitive market in the absence of Defendants' conduct and acts; (4) the capital value of TVCN has been damaged and impaired by the fact that the lost revenues and profits TVCN has sustained, as a direct result of the Defendants' actions, has cast doubt about TVCN's growth potential, and has caused TVCN to have an enterprise value less than it otherwise would have had in the absence of Defendants' conduct and acts. The entire business viability of TVCN is threatened by Defendants' conduct and acts. At this time, the exact amount of TVCN's damages has not been calculated, but TVCN believes its damages, before trebling, to be in excess of $458 million.

143. TVCN is without an adequate remedy at law for this continuing injury.

144. As a direct result of Defendants' conduct and acts, the public interest, necessity and convenience have been harmed, in that, people in Metro Denver who otherwise could receive subscription television services through the new wireless cable TV technology have been deprived of the benefits of free and open competition for the delivery of such services.

145. In the event that TVCN's injunctive relief is not granted, and Defendants are allowed to continue their conduct, which may lead to the destruction of TVCN, a resident in any cabled carea in Metro Denver, who may be desirous of subscribing to the ESPN Channel and the TNT Channel would have no choice but to subscribe to cable-TV monopolist in his area and pay whatever price the monopolist dictates. Subscription television is unique in that if said resident does not like the price, quality of

reception or service provided by the monopolist, (a) the resident cannot find a reasonable substitute or interchangeable product for the ESPN Channel and TNT Channel, (b) the resident cannot simply go to an adjacent area and bring home the same or similar product, and, therefore, the resident will not have a competitive choice if TVCN is not allowed access to the ESPN Channel and TNT Channel ("essential facilities").

146. Some of TVCN's existing and potential subscribers are in areas that are not currently cabled and may never be cabled in the foreseeable future ("Uncabled Areas"). Cable-TV-operator Defendants view the sparsely populated areas as economically not feasible or attractive for coaxial cables. There are approximately 187,000 homes in such uncabled areas in Metro Denver. The only way these people living in such Uncabled Areas can receive the ESPN Channel and TNT Channel, as well as other subscription television channels, at reasonable prices, is through the WCTV services of TVCN. In the event that Defendants are allowed to continue boycotting, and excluding TVCN, and refusing access of the ESPN Channel and TNT Channel to TVCN, people living in Uncabled Areas are and will continue to be deprived, permanently, from the opportunity to receive the ESPN Channel and TNT Channel or any of the subscription television channels.

147. Some of TVCN's existing and potential subscribers are in cabled areas, in which TVCN's services are in direct competition with cable TV services of Defendants. Defendants' conduct and acts have caused and will continue to cause harm and damage to the competitive process and consumers. The competitive process includes

giving consumers competitive choices, the benefits of lower prices, better or different choices of products, and more efficient methods of production or delivery of services. Defendants' conduct and acts are impairing and will ultimately destroy the competitive process unless Defendants are enjoined.

148. Defendants' conduct and acts have enabled Defendants to maintain and enlarge their monopoly power in the market for subscription television in Metro Denver, and to fix prices in which cable-TV-operator Defendants increased monthly subscription fees by as much as 84% between 1986 and 1990, while simultaneously reducing the number of cable TV channels (output) offered to the public. The agreement, understanding, combination or conspiracy between Defendants to, *inter alia*, fix prices and exclude competitors has allowed Defendant ESPN to increase its prices by more than 250% in a period of about four years.

149. No harm will be suffered by either ESPN or TNT if they are required to deal with TVCN. To the contrary, it is in their best individual interest to deal with TVCN.

150. By reason of the foregoing, Plaintiff is entitled to injunctive relief, and Defendants are liable to Plaintiff for damages that have not yet been determined, but believed to be in excess of $458 million, before being trebled by law, along with interest, costs, disbursements, expert witness fees and reasonable attorney's fees, and whatever other relief as this Court deems just.

IX. CAUSES OF ACTION AND CLAIMS FOR RELIEF

COUNT I

MONOPOLIZATION BY DEFENDANTS ESPN AND ABC OF MARKET FOR THE ESPN CHANNEL

151. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-150, inclusive.

152. The above-described conduct of the Defendants constitutes a violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2. The above-described conduct and acts of Defendants ESPN and ABC ("ESPN") constitute monopolization of the market for the ESPN Channel, and an abuse and misuse of monopoly power in that market to lessen and ultimately destroy competition, and to unreasonably restrain trade in Metro Denver in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

153. Defendant ESPN possesses monopoly power in the market for the ESPN Channel in Metro Denver, and has willfully and intentionally obtained, maintained and exercised monopoly power by having engaged in illegal territorial allocations, refusing access to essential facilities, and in anticompetitive, exclusionary, boycott, price-fixing and unfair acts as set forth above.

154. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 2

MONOPOLIZATION BY DEFENDANT TNT OF MARKET FOR THE TNT CHANNEL

155. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-154, inclusive.

156. The above-described conduct of the Defendants constitutes a violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2. The above-described conduct and acts of Defendant TNT constitute monopolization of the market for the TNT Channel, and an abuse and misuse of monopoly power in that market to lessen and ultimately destroy competition, and to unreasonably restrain trade in Metro Denver in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

157. Defendant TNT possesses monopoly power in the market for the TNT Channel in Metro Denver, and has willfully and intentionally obtained, maintained and exercised monopoly power by having engaged in illegal territorial allocations, refusing access to essential facilities, and in anticompetitive, exclusionary, boycott, price-fixing and unfair acts as set forth above.

158. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 3

MONOPOLIZATION BY DEFENDANTS TCI, ATC, UAE, MILE HI AND SCRIPPS

159. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-158, inclusive.

160. The above-described conduct of the Defendants constitutes a violation of Section 2 of the Sherman Act, 15, U.S.C. Section 2. The above-described conduct of Defendants TCI, ATC, UAE, Mile Hi and Scripps constitutes monopolization of the market for subscription television including the ESPN Channel and the TNT Channel, and an abuse and misuse of monopoly power in that market to impair and ultimately destroy competition and the competitive process, and to unreasonably restrain trade in Metro Denver in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

161. Defendants TCI, ATC, UAE, Mile Hi and Scripps possess monopoly power in the market for subscription television, which includes the ESPN Channel and the TNT Channel in Metro Denver, and has willfully and intentionally obtained, maintained and exercised monopoly power by having engaged in illegal territorial allocations, refusing access to essential facilities, and in anticompetitive, exclusionary, boycott, price-fixing and unfair acts as set forth above.

162. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's

damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 4

COMBINATION OR CONSPIRACY TO MONOPOLIZE BY DEFENDANTS ESPN AND ABC

163. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-162, inclusive.

164. The foregoing conduct and acts of Defendants ESPN and ABC constitute a combination or conspiracy with other Defendants to monopolize the relevant market for the ESPN Channel in Metro Denver in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

165. Defendant ESPN has combined or conspired with other Defendants to monopolize the market for the ESPN Channel. The overt acts in furtherance of Defendant ESPN's conspiracy or combination, and the specific intent to monopolize the market for the ESPN Channel include, *inter alia*, limiting access to a single apartment complex, access refusal to essential facilities for the relevant ESPN Channel market in Metro Denver, fixing prices as charged to consumers, price discrimination against TVCN, a group boycott, unreasonable territorial allocations and exclusionary measures as set forth above.

166. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's

damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 5

COMBINATION OR CONSPIRACY TO MONOPOLIZE BY DEFENDANT TNT

167. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-166, inclusive.

168. Defendant TNT has combined or conspired with other Defendants to monopolize the market for the TNT Channel. The overt acts in furtherance of Defendant TNT's conspiracy or combination, and the specific intent to monopolize the market for the TNT Channel include, *inter alia*, access refusal to essential facilities for the relevant TNT Channel market in Metro Denver, fixing prices , a group boycott, unreasonable territorial allocations and exclusionary measures as set forth above.

169. The foregoing conduct and acts of Defendant TNT constitute a combination or conspiracy with other Defendants to monopolize the relevant market for the TNT Channel in Metro Denver in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

170. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 6

COMBINATION OR CONSPIRACY TO MONOPOLIZE BY DEFENDANTS TCI, ATC, UAE, MILE HI AND SCRIPPS

171. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-170, inclusive.

172. The above-described conduct and acts of cable-TV-operator Defendants TCI, ATC, UAE, Mile Hi and Scripps constitute a combination or conspiracy to monopolize the relevant market for subscription television, which market includes the ESPN Channel submarket and the TNT Channel submarket, and have abused and misused their monopoly power in said market to gain a competitive advantage, in Metro Denver in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

173. Defendants TCI, ATC, UAE, Mile Hi and Scripps have combined or conspired with other Defendants to monopolize the market for subscription television. The overt acts in furtherance of the conspiracy combination of Defendants TCI, ATC, UAE, Mile Hi and Scripps, and their specific intention to monopolize the market for subscription television, include, *inter alia*, access refusal to essential facilities, price fixing, a group boycott, unreasonable territorial allocations, exclusionary measures, anticompetitive and unfair practices as set forth above.

174. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's

182. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 9

ATTEMPT TO MONOPOLIZE MARKET BY DEFENDANT'S TCI, ATC, UAE, MILE HI AND SCRIPPS

183. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-182, inclusive.

184. The above-described conduct and acts of Defendants constitute an attempt to monopolize the relevant market for subscription television, including the ESPN Channel submarket and the TNT Channel submarket. The above-described acts of the Defendants evidence a specific intent to control prices and destroy competition in the relevant market through predatory and anticompetitive conduct directed to accomplishing that unlawful purpose. With the specific intent to monopolize, and with the implementation of a design and strategy in furtherance of such an attempt, Defendants have engaged in such acts as, *inter alia*, a group boycott, price-fixing, territorial allocations, access refusal to essential facilities, exclusionary measures and unfair practices, and have thereby achieved a dangerous probability of success that they will obtain a monopoly in the market for subscription television in Metro Denver, including the ESPN

Channel submarket and the TNT Channel submarket, if they have not already done so.

185. The foregoing conduct and acts of Defendants TCI, ATC, UAE, Mile Hi and Scripps in attempting to monopolize the relevant market for subscription television in Metro Denver are in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

186. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 10

UNREASONABLE RESTRAINT OF TRADE BY ALL DEFENDANTS

187. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-186, inclusive.

188. The above-described conduct and acts of all Defendants constitute a contract, combination, concerted action, agreement, understanding or conspiracy in unreasonable restraint of trade in Metro Denver in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1.

189. All Defendants have become members of a continuing agreement, combination, concerted action, understanding to unreasonably restrain trade and commerce, in that, *inter alia*, each of the refusals to access the ESPN

Channel and the TNT Channel ("essential facilities"), each of the territorial allocations, each of the exclusionary measures, and each act of the boycott constitutes a contract, combination, or conspiracy to restrain trade and commerce unreasonably in the market of the ESPN Channel, the TNT Channel, and subscription television.

190. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 11

UNFAIR COMPETITION BY ALL DEFENDANTS

191. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-190, inclusive.

192. The above-described conduct and acts of the Defendants including, *inter alia*, group boycott, access refusals to essential facilities, exclusionary measures, territorial allocations and price discriminations constitute acts of unfair competition.

193. The foregoing conduct, acts, actions and activities of all Defendants have been undertaken at all times maliciously, knowingly, wilfully and in conscious disregard of the legal rights of plaintiff TVCN and its relations with its subscribers.

194. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain

incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 12

PRICE DISCRIMINATION BY DEFENDANT ESPN

195. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-194, inclusive.

196. Defendants' above-described alleged conduct discriminates in the price and sale of the ESPN Channel to lessen competition and create a monopoly in commerce in violation of 15 U.S.C. Section 13.

197. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 13

VIOLATIONS BY ALL DEFENDANTS

198. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-197, inclusive.

199. The above described conduct and acts are in violation of Colo. Rev. Stat. Ann. Sections 6-2-101 through 6-2-117, inclusive.

200. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 14

VIOLATIONS BY ALL DEFENDANTS

201. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-200, inclusive.

202. The above-described conduct and acts are in violation of Colo. Rev. Stat. Ann. Sections 6-4-101 through 6-4-109, inclusive.

203. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 15

VIOLATIONS BY ALL DEFENDANTS

204. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-203, inclusive.

205. The above-described conduct and resulting violations of statutes entitles the Plaintiff to injunctive relief.

206. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

COUNT 16

VIOLATIONS BY ALL DEFENDANTS

207. Plaintiff TVCN repeats and realleges each allegation set forth above in Paragraphs 1-206, inclusive.

208. The above-described conduct and acts are in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Section 1 and 2, 15 U.S.C. Section 13, Colo. Rev. Stat. Ann. Sections 6-2-101 through 6-2-117, inclusive, and 6-4-101 through 6-4-109, inclusive.

209. By reason of these violations, Plaintiff TVCN has been injured, and will continue to suffer and sustain incalculable, substantial, immediate and irreparable injury to its business, reputation, property and accumulated goodwill. At this time, the exact amount of TVCN's damages has not been determined, but TVCN believes its damages, before trebling, to be in excess of $458 million.

X. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays:

Trial by Jury of all issues properly tirable thereby.

A. That the Defendants be found to have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2.

B. That Defendants be found to have violated Colo. Rev. Stat. Sections 6-2-101 through 6-2-117 and 6-4-101 through 6-4-109, commonly known as the Unfair Practices Act and Restraint of Trade and Commerce Article, respectively.

C. That, pursuant to Section 16 of the Clayton Act, 15 U.S.C. Section 26, and Colo. Rev. Stat. Sections 6-2-101 through 6-2-117 and 6-4-101 through 6-4-109, Defendants and its officers, directors, employees, agents and other representatives and those in active concert or participation with it be enjoined and refrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing their boycott and refusal to deal with Plaintiff, or from adopting or following any practice, plan, program, device or course of conduct having a similar purpose or effect.

D. That, pursuant to Section 16 of the Clayton Act, 15 U.S.C. Section 26, and the Colo. Rev. Stat. 6-2-101 through 6-2-117 and 6-4-101 through 6-4-109, Defendants and its officers, directors, agents, employees or other representatives, and those persons or entities in active concert or participation with it be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the conspiracy and attempt to

monopolize, and monopoly, hereinbefore alleged or from adopting or following any practice, plan, program, device or course of conduct having a similar purpose or effect.

E. That the final judgment apply to all Defendants and to any parent and/or subsidiary corporations, and to their successors and assigns.

F. An order that Defendants shall immediately cancel and be enjoined from maintaining, promulgating or practicing any policy that denies TVCN access to the ESPN Channel and TNT Channel and allow TVCN to broadcast said Channels on TVCN's Wireless Cable TV station in Metro Denver.

G. An order that Defendants shall in good faith negotiate ESPN and TNT affiliate status with TVCN on a non-discriminatory basis, subject to reasonsable payments to ESPN and TNT for the provision of their programming and the inclusion of ESPN's and TNT's programming in the services provided by TVCN to its subscribers in Metro Denver.

H. That, pursuant to Section 16 of the Clayton Act, 15 U.S.C. Section 26 and Colorado Revised Statutes 6-2-101 through 6-2-117 and 6-4-101 through 6-4-109, the Court enter such other decree as may be required to restore competition between cable TV and wireless cable TV systems.

I. That Plaintiff be awarded its costs of suit and reasonable attorney's fees in accordance with Section 16 of the Clayton Act, 15 U.S.C. 15 and Colorado Revised Statutes.

J. Compensatory damages in the amount of $458 Million, trebled by law to the amount of $1,374,000,000.

K. Interest from the date of injury (at the statutory rate).

L. Costs, expert witness fees and disbursements of this action.

M. That Plaintiff have such other and further relief as the Court shall deem just and proper.

DATED this 16th day of August, 1990.

Respectfully submitted,

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APPENDIX D

STATUTORY PROVISIONS

Those in effect at the inception of the alleged offenses

§ 1. Trust, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended on November 16, 1990

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(2)

Supreme Court, U.S.
FILED
OCT 30 1992
OFFICE OF THE CLERK

No. 92-576

In the Supreme Court of the United States of America

October Term, 1992

TV COMMUNICATIONS NETWORK, INC.,

Petitioner,

vs.

TURNER NETWORK TELEVISION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's decision in *Eastman Kodak* v. *Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992) render erroneous the Tenth Circuit's finding that Petitioner failed to allege a product market sufficient to provide a basis for a claim against TNT, Inc. under Section 2 of the Sherman Act and failed to allege facts sufficient to support a claim against TNT, Inc. under Section 1 of the Sherman Act?

2. In determining the sufficiency of the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), did the Tenth Circuit err in holding that to survive a motion to dismiss, an antitrust complaint must allege facts sufficient to demonstrate the existence of an antitrust claim?

3. Did the Tenth Circuit err in determining that Petitioner failed to allege facts sufficient to demonstrate either the existence of a group boycott of Petitioner or a conspiracy to monopolize the market for the TNT Channel?

PARTIES TO THE PROCEEDING

Petitioner TV Communications Network, Inc., as Plaintiff, and Respondent Turner Network Television, Inc., as one of several Defendants, were parties to the proceeding below.[1] ESPN, Inc., Capital Cities/ABC, Inc., Tele-Communications, Inc., United Artists Entertainment Company, American Television & Communications Corp., Scripps Howard Cable Company, Scripps Howard Communications, and Mile Hi Cable Company were the other Defendants in the proceedings before the District Court and the Tenth Circuit. Each of these other Defendants settled its claims with Petitioner prior to oral argument in the Tenth Circuit.

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[1] Pursuant to Supreme Court Rule 29.1, Respondent states that Turner Network Television, Inc. is a wholly owned subsidiary of Turner Broadcasting System, Inc. All of Turner Network Television, Inc.'s subsidiaries are wholly owned subsidiaries.

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STATUTES INVOLVED

Petitioner's Appendix D should be corrected to reflect that the following statutes are involved in this case:

Section 1 of the Sherman Act (as amended November 16, 1990), 15 U.S.C. § 1.

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act (as amended November 16, 1990), 15 U.S.C. § 2.

Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. §15(a).

(a) Amount of Recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be

STATEMENT OF THE CASE

A. Statement of Facts

This case involves the supply and distribution of television programming produced by TNT, Inc. and ESPN, Inc. for "subscription" or "nonbroadcast" television. In general, nonbroadcast television programming is produced by "programmers" which supply such programming to "operators." (App. C. 8-9 at ¶¶ 15, 16, 19, 20).[2] Operators distribute the programming of various programmers to local subscribers for a monthly fee. (App. C. 8 at ¶ 17).

Programming for nonbroadcast television is delivered to individual subscribers by operators primarily by means of coaxial cable. (App. C. 16 at ¶ 34). Some distributors of programming, however, do not utilize coaxial cable to distribute programming to their subscribers. For example, multichannel multipoint distribution service ("MMDS") or "wireless cable" operators deliver programming to their subscribers by means of terrestrial microwave transmission. (App. C. 16-17 at ¶¶ 35-36).

1. The Parties Below

TVCN is a "wireless cable" operator that distributes nonbroadcast television programming over-the-air on certain microwave frequencies to subscribers in the metropolitan Denver area. (App. C. 4 at ¶ 2; App. C. 17 at ¶ 36). Subscribers receive TVCN's microwave television signals by means of a small microwave antenna and associated electronic equipment. (App. C. 17 at ¶ 36).

TNT, Inc. is an entity which manufactures, produces and supplies various types of nonbroadcast television programming. TNT, Inc.'s programming allegedly consists of movies and other entertainment programs and certain "National Premium Sports

---

[2] All facts are based on allegations set forth in the Amended Complaint which is reprinted as Appendix C to TVCN's Petition. References to the Amended Complaint are cited herein as follows: "(App. C ___ at ¶ ___)."

Programming." (App. C. 9 at ¶ 19). TNT, Inc. transmits its programming to "authorized affiliates" which in turn retransmit and distribute the TNT service via coaxial cable to local subscribers for a monthly fee. (App. C. 9 at ¶ 20).

ESPN, Inc., like TNT, Inc., is a programmer which is involved in the manufacture, production and wholesale supply of "National Premium Sports Programming" for nonbroadcast television. (App. C. 8 at ¶ 15). ESPN, Inc. also provides its programming to "authorized affiliates" which redistribute the ESPN service to their subscribers for a monthly fee. (App. C. 8-9 at ¶¶ 16, 17, 20).

Tele-Communications Inc. ("TCI"), United Artists Entertainment Co. ("UAE"), American Television and Communications Corp. ("ATC"), Scripps Howard Cable Company and Scripps Howard Communications ("Scripps") and Mile Hi Cable Company ("Mile Hi") are all cable operators that distribute television programming to subscribers in the greater Denver metropolitan area. (App. C. 4-6 at ¶¶ 4-7). Because each of these cable operators is the exclusive operator for one or more separate geographic areas within metropolitan Denver, (App. C. 9-11 at ¶¶ 21-26), these cable operators do not and have never competed against each other for the same subscribers. (App. C. 38 at ¶¶ 110; App. C. 41 at ¶ 124).

2. The Alleged Relevant Markets

According to the Amended Complaint, there are a number of "relevant product markets." Specifically, TVCN mentions the market for "subscription television" or "cable television subscription in metro Denver," the "National Premium Sports Programming" market, and the markets for the "TNT Channel" and the "ESPN Channel."

The product market for "subscription television" or "cable TV subscription in metro Denver" is the market in which operators distribute nonbroadcast television programming to subscribers. According to the Amended Complaint, this "market" is monopolized by Defendants TCI, ATC, UAE, Mile Hi, and

Scripps, which allegedly maintain a market share approaching 100% in their respective geographic areas of operation. (App. C. 11 at ¶ 27).

While not specifically described in the Amended Complaint, "National Premium Sports Programming" is alleged to be another relevant product market. TVCN alleges that both ESPN, Inc. and TNT, Inc. produce "National Premium Sports Programming" for nonbroadcast television. (App. C. 8 at ¶ 15; App. C. 9 at ¶ 19).

Finally, the "TNT Channel" which TVCN alleges to be simply TNT, Inc.'s programming and the "ESPN Channel" which is ESPN, Inc.'s programming, are also alleged to be relevant product markets. (App. C. 12-14 at ¶¶ 30, 32; App. C. 32 at ¶¶ 83-84). TVCN alleges that the relevant geographic market for all allegations of the Amended Complaint is the Denver metropolitan area. (App. C. 11 at ¶ 26).

3. Alleged Anticompetitive Conduct By TNT, Inc.

At the time the TNT service was launched, TNT, Inc. entered into exclusive affiliate agreements with various cable operators in the metropolitan Denver area which authorized such cable operators to receive and retransmit the TNT service to their local subscribers. (App. C. 24 at ¶ 55). Since November of 1988, TNT, Inc. has refused to authorize TVCN to receive and retransmit the TNT service to all potential subscribers in metro Denver. (App. C. 23-24 at ¶ 54).

TVCN generally alleges in Counts 2, 5 and 8 of the Amended Complaint that TNT, Inc.'s refusal to authorize TVCN to receive and retransmit the TNT service constitutes monopolization, attempted monopolization and conspiracy with "other Defendants" to monopolize the market for the TNT Channel in violation of Section 2 of the Sherman Act. (App. C. 51 at ¶¶ 156-158; App. C. 54 at ¶¶ 168-170; App. C. 57-58 at ¶¶ 180-182). Additionally, TVCN generally claims that TNT, Inc.'s refusal to authorize TVCN to receive and retransmit the TNT service has occurred as a result of an agreement

between "the Defendants" to boycott TVCN. (App. C. 26 at ¶¶ 62-63). The Amended Complaint also alleges that TNT, Inc. and other Defendants engaged in "territorial allocation schemes." (App. C. 38 at ¶ 110). According to the Amended Complaint, the alleged agreement to boycott TVCN and the alleged "territorial allocation schemes" constitute violations of Section 1 of the Sherman Act. (App. C. 59-60 at ¶ 189).

B. Proceedings Below

In May 1990, apparently as a result of ESPN, Inc.'s refusal to allow TVCN to provide the ESPN service to all of its subscribers, TVCN commenced this action by filing a Complaint which named ESPN, Inc. as the sole defendant. After ESPN, Inc. filed an initial motion to dismiss, TVCN, on August 18, 1990, filed its Amended Complaint which added Defendants Capital Cities/ ABC, Inc., TCI, UAE, ATC, Scripps, Mile Hi and TNT, Inc.

On September 28, 1990, all Defendants filed Motions to Dismiss the Amended Complaint. By Order dated December 21, 1990, the District Court of Colorado, Judge Sherman G. Finesilver, converted Defendants' Motions to Dismiss into Motions for Summary Judgment and granted these Motions. After TVCN filed a Motion to Alter or Amend Judgment, the District Court vacated its December 21, 1990 Order and granted the Defendants' Motions to Dismiss on April 5, 1991. TVCN appealed that decision to the Court of Appeals for the Tenth Circuit.

By Opinion dated May 19, 1992, the Court of Appeals for the Tenth Circuit affirmed the Opinion of the District Court. *TV Communications Network, Inc.* v. *Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir. 1992) (App. A.). In its Opinion, the Tenth Circuit determined that TVCN's reliance on the market for the TNT Channel as a basis for its monopolization and attempt to monopolize claims against TNT, Inc. rendered those claims insufficient as a matter of law. 964 F.2d at 1025-26 (App. A. 7-8). Additionally, because it found that TVCN had alleged no facts to support its claims that TNT, Inc. conspired

with the cable operator Defendants to further their monopoly power or that the alleged conspirators possessed a specific intent to monopolize, the Tenth Circuit held that TVCN had failed to allege a conspiracy to monopolize claim against TNT, Inc. 964 F.2d at 1026-27 (App. A. 9-11). Finally, the Tenth Circuit determined that TVCN had not alleged facts sufficient to support its conclusory allegations that TNT, Inc. had engaged in price fixing, group boycott or other concerted behavior in violation of Section 1 of the Sherman Act. 964 F.2d at 1027-28 (App. A. 12-14).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE SUPREME COURT'S DECISION IN *EASTMAN KODAK CO.* v. *IMAGE TECHNICAL SERVICES, INC.*, 112 S. CT. 2072 (1992) PROVIDES NO BASIS FOR SUMMARY REVERSAL OF THE TENTH CIRCUIT'S DECISION.

After the Tenth Circuit issued its Opinion below, this Court announced its decision in *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992). As this Court stated in its opinion, *Eastman Kodak* involved the issue of " . . . whether a defendant's lack of market power in the primary equipment market precludes — as a matter of law — the possibility of market power in derivative aftermarkets." 112 S. Ct. at 2076.

TVCN contends that *Eastman Kodak* mandates summary reversal of the Tenth Circuit's Opinion. This argument demonstrates a misunderstanding not only of the nature and scope of the Court's decision in *Eastman Kodak*, but also of the defective nature of TVCN's own allegations.

A. The Application Of *Eastman Kodak* Would Not Change The Tenth Circuit's Finding That TVCN's Alleged Product Market Does Not Provide A Basis For A Section 2 Claim Against TNT, Inc.

TVCN first argues that the Tenth Circuit committed error by determining that TVCN's failure to allege an appropriate product market rendered TVCN's monopolization and attempt to monopolize claims against TNT, Inc. fatally defective. Specifically, TVCN now contends that in using the alleged product market for the TNT Channel as the relevant market in its consideration of TVCN's claims, the Tenth Circuit either inappropriately ignored allegations which stated that the proper product market is the market for subscription television or erred in determining that the market for the TNT Channel cannot support claims against TNT, Inc. for monopolization and attempt to monopolize. (Petition at 13-14). Contrary to TVCN's contentions, *Eastman Kodak* provides no basis for summary reversal or further review of the Tenth Circuit's determination that TVCN's allegations of the relevant product market are insufficient as a matter of law.

If this Court were to accept TVCN's principal argument that the Tenth Circuit adopted the incorrect product market, *Eastman Kodak* would not be even remotely applicable to the issue before Court. Rather, at best, the question presented would involve a determination of whether the Tenth Circuit adopted the correct product market and whether that product market, the market for "subscription television," which is not a derivative aftermarket like that considered in *Eastman Kodak*, is sufficient to support a claim under Section 2 of the Sherman Act against TNT, Inc.

Moreover, even if the Court were to consider TVCN's claims based on a product market defined as "subscription television," the result reached would be identical to that reached by the Tenth Circuit. The alleged market for "subscription television" is the market in which operators distribute nonbroadcast television to subscribers. (App. C. 11 at ¶ 27). Because TVCN

has not and could not allege that TNT, Inc., a supplier of cable television programming, competes in the market for distribution of subscription television to subscribers, it would be impossible for TNT, Inc. to monopolize that market. In fact, TVCN's own allegations that Defendants TCI, ATC, UAE, Mile Hi and Scripps monopolize the market for subscription television in their respective geographic areas of operation demonstrate the contrived nature of TVCN's argument that the market for subscription television can provide a basis for a Section 2 claim against TNT, Inc. (App. C. 11 at ¶ 27).

Additionally, *Eastman Kodak* does not render erroneous the Tenth Circuit's conclusion that the alleged market for the TNT Channel does not provide a basis for a Section 2 claim against TNT, Inc. In determining that service and parts for Kodak equipment potentially could be a separate product market for purposes of Section 2, this Court considered the issue of market definition in the narrow context of a derivative aftermarket comprised of replacement parts and service for a particular brand of equipment. 112 S. Ct. at 2090. Because only Kodak parts could be used to service Kodak equipment, these parts necessarily could not have substitutes. By contrast, the TNT Channel is only one cable television service among many competing services. In fact, TVCN itself alleges that the aspect of TNT, Inc.'s programming which it considers unique, "National Premium Sports Programming" is also produced and provided by ESPN. (App. C. 8 at ¶ 15). Therefore, it is impossible to characterize the power which TNT, Inc. maintains over its own programming service as the power which can provide a basis for a claim under Section 2 of the Sherman Act. *See United States* v. *E. I. Du Pont De Nemours & Co.*, 351 U.S. 377, 392-93 (1956).

B. *Eastman Kodak* Has No Application To TVCN's Defective Allegations Of Conspiracy.

TVCN contends that this Court's decision in *Eastman Kodak* also mandates summary reversal of the Tenth Circuit's determination that TVCN failed to allege a conspiracy sufficient to provide a basis for either a conspiracy to monopolize claim or

a claim under Section 1 of the Sherman Act against TNT, Inc. Conspicuously absent from TVCN's argument, however, is any real effort to explain the applicability of this Court's decision in *Eastman Kodak* to those aspects of the Tenth Circuit's decision which address TVCN's conspiracy to monopolize and Section 1 claims. In fact, the portions of the Tenth Circuit's decision of which TVCN complains are not even remotely related to the narrow issues addressed by this Court in *Eastman Kodak*. Rather, the Tenth Circuit's Opinion merely constitutes an unremarkable finding that TVCN's defective allegations amount to little more than a conclusory statement that a conspiracy existed. *See TV Communications Network*, 964 F.2d at 1026-27 (App. A. 10). Because the Tenth Circuit's finding was not only correct, but also unexceptional, neither summary reversal nor a further substantive review of this aspect of the Tenth Circuit's Opinion is warranted.

II. THE ESTABLISHED STANDARD APPLIED BY THE TENTH CIRCUIT IN DETERMINING THE SUFFICIENCY OF TVCN'S AMENDED COMPLAINT DOES NOT CONFLICT WITH THE STANDARDS APPLIED BY OTHER CIRCUITS IN DECIDING MOTIONS TO DISMISS BROUGHT PURSUANT TO RULE 12(b)(6).

TVCN argues that in considering the sufficiency of TVCN's Complaint, the Tenth Circuit applied a standard which conflicts with the standards used by other circuits in deciding motions to dismiss brought pursuant to Rule 12(b)(6). Because of this alleged "inconsistency," TVCN contends that this Court should grant certiorari to establish the standard that lower federal courts should use in determining the sufficiency of a complaint in an antitrust case. TVCN's argument misinterprets applicable case law and ignores the substance of the Tenth Circuit's Opinion.

The standard to be utilized in deciding a motion brought pursuant to Rule 12(b)(6) is settled. Taking the plaintiff's allegations as true, "[a] court may dismiss a complaint only if it is clear

that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). While modern rules allow liberality in pleading, however, it is well established that to state an antitrust claim, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (quoting *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984)); *accord In re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. 1981); *St. Joseph's Hospital, Inc.* v. *Hospital Corp. of America*, 795 F.2d 948, 954 (11th Cir. 1986); *Lombard's Inc.* v. *Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986); *Crane & Shovel Sales Corp.* v. *Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988). Conclusory allegations which merely state that the defendant violated the antitrust laws will not suffice. *See Larry R. George Sales Co.* v. *Cool Attic Corp.*, 587 F.2d 266, 273 (5th Cir. 1979); *Car Carriers, Inc.*, 745 F.2d at 1106; *Crane & Shovel Sales Corp.*, 854 F.2d at 805.

The cases which TVCN cites in support of its argument do not diverge from this settled standard. Rather, in those cases, the courts also applied the general principle that to survive a motion to dismiss, a plaintiff must allege facts sufficient to demonstrate the elements of a claim cognizable under the antitrust laws. *See Newman* v. *Universal Pictures*, 813 F.2d 1519, 1523 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988) (affirming dismissal of antitrust complaint); *Kerasotes Michigan Theatres, Inc. v. Nat'l Amusements, Inc.*, 854 F.2d 135, 136-37 (6th Cir. 1988); *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59, 64-65 (2d Cir. 1986).

In its decision below, the Tenth Circuit construed the allegations of the Amended Complaint liberally according to the principles pronounced in Fed. R. Civ. P. 8 and well established case law. *See TV Communications Network, Inc.*, 964 F.2d at 1024 (App. A. 5). Contrary to TVCN's contentions, the standard

which the Tenth Circuit applied in determining the sufficiency of TVCN's Amended Complaint does not conflict in any way with the 12(b)(6) standards other circuits apply in determining the sufficiency of antitrust complaints. Rather, the standard articulated by the Tenth Circuit merely restates the well recognized principle that a plaintiff, to survive a motion to dismiss for failure to state a claim, must allege facts sufficient, if proved, to entitle it to relief.

TVCN's real complaint relates not to the Tenth Circuit's failure to use the correct standard in determining the sufficiency of its Amended Complaint, but rather the result reached by the Tenth Circuit after it conducted its analysis. Such dissatisfaction with the Tenth Circuit's decision does not provide a basis for review of that decision.

III. REVIEW OF THE TENTH CIRCUIT'S CONCLUSION THAT TVCN FAILED TO ALLEGE AN ILLEGAL GROUP BOYCOTT OR A CONSPIRACY TO MONOPOLIZE CLAIM IS UNWARRANTED.

TVCN finally contends that this Court should grant certiorari to review the Tenth Circuit's conclusion that TVCN failed to allege an illegal group boycott or a conspiracy to monopolize claim against TNT, Inc. Because the Tenth Circuit's conclusion was unremarkable and based on well established precedent, this Court should not grant certiorari to review that conclusion.

As this Court has recognized "*[p]er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977). In determining the legality of certain agreements "[i]t is important to distinguish between 'horizontal' restraints, *i.e.*, agreements between competitors at the same level of market structure and 'vertical' restraints, *i.e.*, combinations of persons at different levels of the market structure, such as manufacturers and distributors." *Oreck Corp.* v. *Whirlpool Corp.*, 579

F.2d 126, 131 (2d Cir. 1978). Horizontal restraints with no purpose except stifling competition are per se illegal. *See, e.g., United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972).

Refusals to deal can have characteristics which are horizontal and/or vertical. To protect against automatic condemnation of conduct which is not inherently anticompetitive, however, courts have held that absent an agreement on prices or price levels, a refusal to deal will not be deemed per se illegal unless it includes concerted action between two or more competitors at the same market level. *See, e.g., Lomar Wholesale Grocery, Inc.* v. *Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 591 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); *Key Financial Planning Corp.* v. *ITT Life Ins. Corp.*, 828 F.2d 635, 641 (10th Cir. 1987); *Bailey's, Inc.* v. *Windsor America, Inc.*, 948 F.2d 1018, 1031 (6th Cir. 1991).

TVCN predicates its group boycott claim on alleged concerted activity between TNT, Inc., a programmer, and the cable operator Defendants, which operate in the market for subscription television. The Amended Complaint, however, unambiguously alleges that the cable operator Defendants do not compete with each other for the same subscribers. (App. C. 38 at ¶ 110; App. C. 41 at ¶ 124). Because TVCN has not and cannot allege concerted activity between two or more competitors at the same market level, the Tenth Circuit correctly found that TVCN failed to allege a group boycott claim against TNT, Inc.

Additionally, TVCN's Section 1 claim could be dismissed for the independent reason that TVCN failed to allege the existence of a conspiracy to boycott. In its Amended Complaint, TVCN conclusorily alleges that the "defendants" have conspired to boycott TVCN and have agreed to divide the metro Denver subscription television market in violation of Section 1. TVCN, however, has not alleged any facts which demonstrate that TNT, Inc.'s refusal to deal with TVCN was part of a common scheme with the other defendants to boycott TVCN. The absence of such facts supporting its conspiracy allegations also renders TVCN's group boycott claim fatally defective. *See Lombard's, Inc.*, 753 F.2d at 975; *Sadler* v. *Rexair, Inc.*, 612 F. Supp. 491, 494 (D. Mont.

1985) ("A conclusory allegation of a conspiracy to restrain trade will not survive a motion to dismiss.").

For similar reasons, TVCN has no basis to seek review of the Tenth Circuit's finding that the Amended Complaint fails to allege a conspiracy to monopolize claim against TNT, Inc. TVCN's allegations relating to the alleged conspiracy to monopolize provide only that TNT, Inc. has conspired with "other Defendants" to monopolize the market for the TNT Channel. (App. C. 54 at ¶¶ 168-69). The Amended Complaint is devoid of any other allegations which explain any aspect of this alleged conspiracy. Because TVCN's allegations amount to no more than a conclusory allegation of conspiracy, TVCN has failed to allege the existence of the element of conspiracy. *See Telectronics Proprietary, Ltd.* v. *Medtronic, Inc.*, 687 F. Supp. 832, 838-39 (S.D.N.Y. 1988); *H.R.M., Inc.* v. *Tele-Communications, Inc.*, 653 F. Supp. 645, 648 (D. Colo. 1987); *Sadler*, 612 F. Supp. at 494.